

No. 79252-6.

SUPREME COURT OF THE STATE OF WASHINGTON

LEO C. BRUTSCHE,

Petitioner,

v.

CITY OF KENT, a Washington municipal corporation, and KING
COUNTY, a political subdivision of the State of Washington,

Respondents.

***AMICUS CURIAE* BRIEF OF AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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I. INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonpartisan, nonprofit organization with over 20,000 members that is dedicated to the preservation and defense of constitutional and civil liberties. Because the powers entrusted to police officers can adversely affect individual liberties if they are misused, ACLU has a longstanding interest in police accountability. Over the years, ACLU has worked to ensure that police departments operate subject to adequate internal and external oversight mechanisms to remedy and deter police misconduct. In court, ACLU has advocated for the preservation and application of legal doctrines that are consistent with these same purposes. The ACLU has appeared before this Court in numerous prior cases as *amicus*, as counsel to a party, and as party itself.

II. STATEMENT OF THE CASE

A heavily-armed SWAT team executed a search warrant on property owned by the plaintiff, Mr. Leo Brutsche. *See Villa Decl.*, CP 46-47 ¶¶ 2-4. In a declaration submitted to the trial court, Mr. Brutsche testified as follows:

At the time of the raid, I offered my keys to the officer in charge, Sergeant Jaime Sidell. I offered to escort the officers around my property and open all doors for them. Sergeant Sidell rejected my offer, saying “we have our own ways of getting in.”

CP 135 ¶ 5.

The method preferred by the SWAT team was to use battering rams to force down the doors. *Id.* ¶ 3. Mr. Brutsche incurred thousands of dollars in carpentry bills to replace the doors and repair the splintered door jambs. *Id.* ¶ 11.

Mr. Brutsche filed suit, claiming (among other things) that it was negligent to destroy the doors when entry could have been effected without causing any damage at all. The trial court granted summary judgment for defendants, and the Court of Appeals affirmed. In its unpublished opinion, the Court of Appeals asserted that there was a general rule that “law enforcement activities are not reachable in negligence,” and that law enforcement officers had no legal duty to a property owner to avoid inflicting unnecessary property damage.

III. SUMMARY OF ARGUMENT

The Court of Appeals was wrong. There is an extremely well-established legal duty of police officers to avoid negligent damage to property, even when the damage occurs during the course of a search conducted pursuant to a valid warrant. This duty arises both from the common law and from the state and federal constitutions. A warrant does not immunize police from liability for breach of this duty. As the Washington Supreme Court stated many years ago, “[i]n executing a search warrant, officers of the law should do no unnecessary damage to the property to be examined, and should so conduct the search as to do the

least damage to the property consistent with a thorough investigation.”

Goldsby v. Stewart, 158 Wash. 39, 41, 290 P. 422 (1930).

As the numerous cases cited below show, Mr. Brutsche’s cause of action relies on black-letter law and does not break any new ground. To the contrary, it is the Court of Appeals’ decision that conflicts with well-established precedent and constitutional values. Among the dozens of cases on point include cases where plaintiffs have been able to recover from police for negligently caused damage to doors, *Goldsby*, and damage negligently caused through use of battering rams, *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000); *Langford v. Superior Court*, 43 Cal.3d 21, 29, 233 Cal. Rptr. 387, 729 P.2d 822 (1987) (searches using battering rams presumptively unreasonable); *see also United States v. Jones*, 214 F.3d 836, 838 (7th Cir. 2000) (noting in dicta that damages claim could be stated where police “apply a battering ram to a door that was already ajar”). Plaintiff’s negligence action was legally well-founded and not controversial. It should have been allowed to go to the jury.

IV. ARGUMENT

A. Police Have a Duty under Negligence Law to Act Reasonably

For a plaintiff to state an action in negligence, the defendant must have a duty to the plaintiff and must have breached that duty, the breach must be the cause in fact and legal cause of the plaintiff’s injury, and the plaintiff must have suffered actual damage. *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 932, 653 P.2d 280 (1982). Whether the defendant

owes the plaintiff a duty is a question of law. *Id.* at 933. The Court of Appeals erred in holding that the police owed Mr. Brutsche no duty to act reasonably while executing the search warrant.

1. The Common Law of Washington Recognizes a Duty, as Seen in *Goldsby*

The Washington Supreme Court case of *Goldsby v. Stewart, supra*, is squarely on point. In that case, the plaintiff sued when City of Everett police officers damaged a building in the course of executing a search warrant for (then-prohibited) alcohol. As here, the damage included removal of a door. 158 Wash. at 39-40. The Supreme Court held that **“[i]n executing a search warrant, officers of the law should do no unnecessary damage to the property to be examined and should so conduct the search as to do the least damage to the property consistent with a thorough investigation.”** *Id.* (emphasis added) at 41. In the face of a factual dispute about the necessity for the police action, **“[i]t was for the jury to say whether or not respondents had, in searching appellants’ property, unnecessarily damaged the same.”** *Id.* at 41. Indeed, on remand the jury found for the plaintiff, and its verdict was upheld on appeal. *Goldsby v. Stewart*, 168 Wash. 699, 13 P.2d 32 (1932).

Goldsby did not break new ground. It cited to cases decided in 1849 and 1908, and to the common law treatise *Ruling Case Law*, the predecessor to *American Jurisprudence*. That treatise states that, “while the officers should search thoroughly in every part of the described premises where there is any likelihood that the object searched for may be

found, they should also be considerate of the comfort and convenience of the occupants [and] should mar the premises themselves as little as possible[.]” 24 R.C.L. § 11 (1929), (copy of cited excerpt attached hereto in Appendix A). In *Buckley v. Beaulieu*, the 1908 case cited with approval by *Goldsby*, the police had a warrant to search for intoxicating liquors. 104 Me. 56, 71 A. 70, 71 (1908). Even though they found no evidence of contraband or any indication of secret panels in the wall, the officers used a pickaxe and crowbar to remove portions of the interior walls. *Id.* at 71-72. The Supreme Court of Maine observed that an action could sound in negligence for an unreasonable search, even though the officers acted in good faith and had a warrant. *Id.* at 72. The court looked to the United States Constitution to establish the duty that the officers owed to the plaintiff, *id.* at 71, and held that whether “the conduct of the officer in a given case was reasonable or unreasonable must be determined by all the circumstances of that case.” *Id.*

The City implies that *Goldsby* should not be treated as binding precedent because it has not been widely cited by later cases. This argument is a red herring. Precedents squarely on point that have not been overruled are binding, regardless of how seldom or often they are cited. Moreover, there is a good reason why relatively few state-law negligence cases are brought in Washington courts for injury inflicted during a search: they tend to be brought as constitutional torts instead. In 1961, the United States Supreme Court ruled that the previously dormant Civil

Rights Act, 42 U.S.C. § 1983, provided a remedy for violation of federal constitutional rights even if the defendants' actions could also be remedied by a tort suit under state law. *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The trend toward using constitutional claims accelerated even further upon the enactment of the fee-shifting statute, 42 U.S.C. § 1988. As a result, "[m]ost destruction of property cases arise from § 1983 civil rights suits brought by allegedly aggrieved citizens against law enforcement officers." Fern Lynn Kletter, Annotation, *Destruction of Property as Violation of Fourth Amendment*, 98 A.L.R. 5th 305 (2002). The constitutional dimensions of this case are discussed more thoroughly below; what is important for present purposes is that Mr. Brutsche is entitled to pursue his claim under negligence law in state court even if he could have chosen a different forum.

The Court of Appeals chose to disregard *Goldsby* because it was first cited in an appellate reply brief. Although reply briefs are not the place to raise entirely new arguments, it is perfectly acceptable for a reply to cite additional authority for an argument already raised. Indeed, a court has an obligation to decide a case "in light of all relevant precedents, not simply those cited to, or discovered by, the district court." *Elder v. Holloway*, 510 U.S. 510, 512, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994). Accord, *Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000): "The Court of Appeals' approach [refusing to consider code sections cited in a party's appellate brief but not in the trial court] seems

misguided. A [regulation] is not evidence; it is law. . . . [A]ny court is entitled to consult the law in its review of an issue, whether or not a party has cited that law.”

2. Numerous Decisions and the Restatement Agree with *Goldsby* that a Common Law Duty Exists

The common law duty of police to avoid negligent property damage while executing searches is well-established. Long before the passage of § 1983, or the Fourth Amendment itself, the common law provided a civil damage remedy for the victims of unlawful searches. *Brown v. State*, 89 N.Y. 2d 172, 188, 652 N.Y.S. 2d 223, 674 N.E.2d 1129 (1996) (citing *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (1763); *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (1763); *Entick v. Carrington*, 19 State Tr. 1029, All ER Rep. 41 (1765)). In another case, Judge Cardozo, in holding that the exclusionary rule did not apply to bar evidence in New York, argued that the civil remedies long extant in the common law were adequate remedies for an unreasonable search. *People v. Defore*, 242 N.Y. 13, 24-25, 150 N.E. 585 (1926).

The *Buckley* case cited by *Goldsby* is but one in a long line of common law cases, extending to the present day, holding that a cause of action sounding in negligence may be stated against officers who cause unjustified injury while executing a search warrant. See *Patel v. United States*, 823 F.Supp. 696, 699 (N.D. Cal. 1993) (plaintiffs presented facts sufficient to state claim for “alleged negligence” during search);

Richardson v. Henderson, 651 So.2d 501, 504 (La. Ct. App. 1995) (“The search of a residence must be carried out in such a manner that due respect is given to the property”); *Onderdonk v. State*, 170 Misc.2d 155, 162, 648 N.Y.S.2d 214 (N.Y. Ct. Cl. 1996) (applying *Richardson* standard); *State v. Santana*, 215 N.J. Super. 63, 75, 521 A.2d 346 (N.J. Super. Ct. App. Div. 1987) (“if there is permanent damage to the vehicle caused by a clumsily executed search into a permissible area, the State may be responsible for the ensuing damage”); *Hopkins v. State*, 237 Kan. 601, 611-12, 702 P.2d 311 (1985) (reversing summary judgment on negligence claim against officers); *Moore v. Kilmer*, 185 Okla. 158, 90 P.2d 892, 893 (1939) (“the question is not whether injury was done to the property by the officers in the execution of the search warrant, but rather, whether the officers executed the same in a reasonable and orderly manner”); *Sovich v. State*, 92 Ind. App. 103, 167 N.E. 145, 146 (1929) (“If the officer was guilty of any misconduct in his mode of serving the warrant, he may perhaps have rendered himself liable to an action”) (quoting *Commonwealth v. Welsh*, 110 Mass. 359 (1872)); *Siemiasz v. Landau*, 224 A.D. 284, 285, 229 N.Y.S. 690 (1928) (“His duty was to execute the warrant without unnecessary force or severity.”); *Jackson v. Harries*, 65 Utah 282, 236 P. 234, 236 (1925) (even if police have a valid warrant, “such a search must nevertheless be made in a lawful and reasonable manner); *City of Charleston ex rel. Peck v. Dawson*, 90 W.Va. 150, 110 S.E. 551, 553 (1922) (“it was for the jury to say whether or not there was negligence on

the part of [officer]" where officer with valid arrest warrant negligently executed it); *Gillmor v. Salt Lake City*, 32 Utah 180, 89 P. 714, 715 (1907) (where officers act "negligently, action should be directed against them for redress of wrongs"); *see also United States v. Jones*, 214 F.3d 836, 838 (7th Cir. 2000) (in decision regarding exclusionary rule, noting that "[p]olice had little reason to apply a battering ram to a door that was already ajar" and "[i]f this were a damages action seeking compensation for injury to the occupants or the door, the claim would be a serious one"). The number and venerable nature of these common law cases rebuts any argument by the City that Mr. Brutsche is somehow seeking to formulate a new cause of action.

Recent decisions applying the Federal Tort Claims Act have held that federal officers executing a valid search warrant owe a common law duty not to unreasonably damage property during the conduct of a search. In *Wright v. United States*, the plaintiffs alleged that the police executing the search warrant acted negligently, thereby causing damage to the personal property of the plaintiffs. 963 F.Supp. 7, 15 (D.D.C. 1997). The district court applied "the common law as it is articulated by the District of Columbia courts and, more generally, by the American Law Institute's Restatement (Second) of Torts[,]" *id.*, to find that the "U.S Park Police breached a duty of care owed to plaintiffs" in damaging their personal property. *Id.* at 19. The court decided that, due to the negligent execution of the warrant, the plaintiffs "will be awarded compensatory damages for

their property loss.” *Id.* Similarly, in *Howard v. United States*, the court applied the common law to reject defendant’s motion for summary judgment on plaintiff’s claim that Drug Enforcement Agency officers executed the search at her residence negligently. No. 99-3865, 2000 WL 1272590 (E.D. Pa. Aug. 28, 2000) (copy attached in Appendix B).

As the *Wright* court recognized, the Restatement (Second) of Torts § 214 provides further support for the proposition that the police are subject to liability for negligence. Restatement § 214(1) states: “An actor who has in an unreasonable manner exercised any privilege to enter land is subject to liability for any harm to a legally protected interest of another caused by such unreasonable conduct.” This Restatement section has been cited with approval by Washington courts. *See, e.g., Fradkin v. Northshore Util. Dist.*, 96 Wn.App. 118, 123, n.12, 977 P.2d 1265 (1999).

3. The State and Federal Constitutions Are Independent Sources of the Duty

Even if *Goldsby* were not on point, this Court would need look no further than Article I, § 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution for the duty that all government officers owe to those being searched. “A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence.” RCW 5.40.050. There is no reason to suppose that breach of a duty imposed by the constitution should be treated more leniently in the law than breach of a duty imposed by statute, ordinance, or

administrative rule. As a result, breach of a constitutional duty may at a minimum be considered by the trier of fact in a negligence case.

The same factors used to decide whether a statute sets the standard of ordinary care for negligence law may also be used here with regard to constitutional provisions.

The court may adopt as the standard of conduct of a reasonable person the requirements of a legislative enactment whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 269, 96 P.3d 386

(2004). Here, a person whose property is being searched is within the class of persons that Article I, § 7 was designed to protect. An interest in the sanctity of the home is, at least in part, the particular interest designed to be protected, and property damage (kind of harm) resulting from an unreasonable search (particular hazard) is the injury to be avoided.

Applying *Barrett*, it makes perfect sense to derive the duty directly from the Washington Constitution.

What, then, does the constitution say about unnecessary property destruction during the execution of a search warrant? Fourth Amendment cases address the problem and offer some guidance. In that context, the answer is clear:

The general touchstone of reasonableness which governs Fourth Amendment analysis . . . governs the method of

execution of the warrant. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression.

United States v. Ramirez, 523 U.S. 65, 71, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998). Numerous cases, stretching back decades, hold that claims for property damage must go to the jury where the police are alleged to have executed the search unreasonably, *even where the police had a valid warrant*. See, e.g., *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000) (holding that a reasonable officer would have known that unnecessarily breaking down two unlocked doors with battering ram was unreasonable); *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) (“when executing a search warrant, an officer is limited to conduct that is reasonably necessary to effectuate the warrant’s purpose”); *Bonds v. Cox*, 20 F.3d 697 (6th Cir. 1994); *Rivera v. United States*, 928 F.2d 592 (2d Cir. 1991); *Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982); *Duncan v. Barnes*, 592 F.2d 1336 (5th Cir. 1979); *Wood v. Kitsap County*, No. C05-5575RBL, 2007 WL 1306548 (W.D. Wash. May 3, 2007) (denying summary judgment in § 1983 cause of action as well as action under “the common law of torts”) (copy of unpublished cases attached hereto in Appendix B); *Diaz v. City of New York*, No. 00-CV-2944 (JMA), 2006 WL 3833164 (E.D.N.Y. Dec. 29, 2006); *Henning v. County of Sacramento*, No. S-05-0531 FCD KJM PS, 2006 WL 3348858 (E.D. Cal. Nov. 17, 2006); *Foreman v. Beckwith*, 260 F.Supp.2d 500, 505 (D. Conn.

2003) (“we find there exists a clearly established right not to incur unreasonable property damage during the execution of a search warrant”); *Turner v. Fallen*, No. 92 C 3222, 1993 WL 15647 at *4 (N.D. Ill. Jan. 22, 1993) (rejecting defendant’s motion for summary judgment where, during search, “police officers broke [plaintiff’s] cash register and file cabinet, when they could have avoided this property damage merely by asking her to unlock these items”); *Gurski v. N.J. State Police Dep’t.*, 242 N.J. Super. 148, 161, 576 A.2d 292 (N.J. Super Ct. App. Div. 1990) (“No police officer in the course of executing a warrant can or should, without justification or sufficient reason, destroy private property”).

Article I, § 7 will naturally impose at least as great an obligation on officers, because “[i]t is already well established that article I, section 7 of our state constitution provides to individuals broader protection against search and seizure than does the Fourth Amendment.”. *State v. Parker*, 139 Wn.2d 486, 493 n.2, 987 P.2d 73 (1999). Therefore, a search that is permissible under the Fourth Amendment might be impermissible under Article I, § 7. *Compare, e.g., Parker* (arrest of one or more vehicle occupants does not, without more, provide “authority of law” under state constitution to search personal belongings clearly associated with such nonarrested individuals) with *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) (police may search belongings of passenger in vehicle without individualized suspicion). This heightened protection of the Washington Constitution is especially evident in the case

of the search of a person's home. "In no area is a citizen more entitled to his privacy than in his or her home. For this reason, the closer officers come to intrusion into a dwelling, the greater the constitutional protection." *State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (citation omitted) (holding that, if police seek consent to search home, resident must be informed of right to refuse). Thus, applying the language of *Ramirez*, 523 U.S. at 71, that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful," it is even more likely that such unnecessary destruction of property would violate Washington's constitution.

4. *Keates v. City of Vancouver* Is Inapposite, and Its Dicta Should Be Rejected

In coming to its conclusion that the City owed Brutsche no duty, the Court of Appeals relied almost exclusively on some misleading language in *Keates v. City of Vancouver*. See *Keates*, 73 Wn. App. 257, 869 P.2d 88 (1994). The plaintiff in *Keates* sued the city and a police officer for outrage and negligent infliction of emotional distress related to his interrogation at the hands of police. *Id.* at 259-62. By a 2-1 majority, with then-Judge Alexander dissenting, *Keates* held that "police officers owe no duty to use reasonable care to avoid inadvertent infliction of emotional distress on the subjects of criminal investigations." *Id.* at 269.

Unfortunately, the *Keates* court also made a sweeping generalization, in dicta, that "[a]s a general rule, law enforcement

activities are not reachable in negligence.” *Id.* at 267. The seven cases cited as support for this generalization are *all* cases involving some form of negligent prosecution or incarceration resulting in emotional distress or deprivation of a liberty interest, and therefore have no bearing on the more garden variety negligence, resulting in property damage, that Mr. Brutsche alleges here and that has long been recognized by the law as demonstrated above in Sections A.1, 2, and 3.

Moreover, *Keates*’ generalization that negligence does not apply to law enforcement activities ignored then-existing precedent and remains inaccurate today. *See, e.g., Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987) (holding that town police officer owed duty to person injured by drunk driver to prevent drunk driver from driving once officer knew of the his condition); *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975) (holding that city could be found liable for negligence of police in conduct of high speed car chase); *Boyles v. City of Kennewick*, 62 Wn. App. 174, 177-78, 813 P.2d 178 (1991) (in dismissing suit for injuries caused by police during arrest as barred by statute of limitations, noting that “a claim for negligence against a police officer is possible”); *Logan v. Weatherly*, No. CV-04-214-FVS, 2006 WL 1582379 (E.D. Wash. June 6, 2006) (negligence in dispersing pepper spray at night club); *see also* cases cited in Sections A.1, 2, and 3, *supra*.

Notwithstanding the dicta from *Keates*, tort suits for negligent conduct by police are as easily administered as any other tort action.

Mr. Brutsche's case will not open the proverbial floodgates of litigation, since government actors (likely indemnified by their employers) are *already* liable under § 1983 for unreasonable searches. Whether negligence or constitutional violations or both are involved, the law already permits police the leeway they need to perform their duties and protect safety so long as they act reasonably and without inflicting *unnecessary* damage. *Goldsby, supra*. Pattern jury instructions are already available and have proven to be easily administrable. *See* 3B Fed. Jury Prac. & Inst. § 165.01 (5th ed.), *available on Westlaw at* FED-JI 165.01. The jury, as conscience of the community, is best positioned to decide whether property damage incurred during a search is excessive. "[W]hether an officer's conduct is reasonable is a highly fact-dependent inquiry that can only be determined on a case-by-case basis." *Lawmaster*, 125 F.3d at 1349 (holding that whether police placement of gun in dog's water bowl and deposit of cigar and cigarette ashes on premises during search was objectively reasonable was question for jury). Here, the facts are disputed about whether the use of battering rams was justified under the circumstances. A jury should have been allowed to express its judgment on that contested factual question.

B. A Valid Search Warrant Does Not Confer Immunity on the City

The long litany of cases cited above indicates that the existence of a valid search warrant does not provide immunity from negligence claims. Immunity would also be contrary to Washington public policy. In 1967,

the Washington legislature enacted RCW 4.96.010, providing that “[a]ll local governmental entities . . . shall be liable for damages arising out of . . . the tortious conduct of their past or present officers, employees or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.” The purpose of the statute is to increase the accountability of state officers to the people:

The most promising way to correct the abuses [of government], if a community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit. The ranking officials, motivated by threats to their budget, would issue the order that would be necessary to check the abuses in order to avoid having to pay damages.

Bender v. City of Seattle, 99 Wn.2d 582, 590, 664 P.2d 492 (1983) (quoting *King v. Seattle*, 84 Wn. 2d 239, 244, 525 P.2d 228 (1974)); see also Debra L. Stephens & Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State’s Journey from Immunity to Accountability*, 30 Seattle U. L. Rev. 35, 59 (2006) (“just as in the private sector, the immediate costs [of tort liability] are outweighed by the societal value of encouraging responsible conduct in two ways: through holding governmental entities accountable for tortious acts and through providing compensation to injured citizens”).

It would be wholly at odds with the intent of RCW 4.96.010 if the Court were to hold, as requested by amicus WSAMA, that a warrant effectively immunizes law enforcement officers from responsibility for negligence. The ramifications of such a holding are obvious. In the case

of the MOVE bombing in Philadelphia, police had a warrant to search the premises of a certain row house and to arrest several members of the MOVE cult living therein. William H. Brown, et al., *The Findings, Conclusions, and Recommendations of the Philadelphia Special Investigation Commission*, 59 Temp. L. Q. 339, 345 (1986). In executing the warrant, the police fired over 10,000 rounds of ammunition at the house in less than 90 minutes, used a helicopter to drop a bomb containing substantial quantities of C-4 plastic explosive on the house's roof, and used the resulting fire as a tactical weapon to force people inside to come out. *Id.* at 363, 367-368. Eleven people died during execution of the "search," including five children, and an entire neighborhood was burned down. *Id.* at 367-69. If the Court of Appeals' holding in *Brutsche* is allowed to stand, and police have no duty to those whose homes are being searched, what common law remedy would future victims of such an unreasonable search have?

Moreover, under well-established tort principles, when a person is privileged to be on another's premises, she is not immunized from all conduct on those premises. She still has a duty of care to the owner of the property, and may still be found liable for negligent destruction of the owner's property. Restatement (Second) of Torts § 214(1) (1965); *id.* cmt. a ("A privilege to enter land may be unreasonably exercised either by the intentional doing of an act which a reasonable man would not regard as necessary to effectuate the purposes for which the privilege is given, or by

any negligence in the manner in which the privilege is exercised.”)
(emphasis added); *see also, Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 83, 579 P.2d 346 (jury finding contractor negligent when fire resulted from its actions on owner’s land). Therefore, even though police in this case were lawfully on Mr. Brutsche’s land, they did not have *carte blanche* to execute the warrant in any way they saw fit – they still owed a duty of reasonable care to the property owner. To hold otherwise, whether by holding that no duty was owed or that sovereign immunity applied, would fail to hold governments liable “to the same extent as if they were a private person or corporation.” *See* RCW 4.96.010.

C. The Public Duty Doctrine Does Not Apply

The public duty doctrine does not apply in cases such as this, where plaintiff alleges that defendant police officers *acted* negligently, not that they *failed to act*. *See Logan v. Weatherly*, No. CV-04-214-FVS, 2006 WL 1582379 at *3-4 (discussing distinction laid out in *Coffel v. Clallam County*, 47 Wn. App. 397, 403-04, 735 P.2d 686 (1987)). As a matter of common sense, the police officers, in searching Mr. Brutsche’s home, did not owe a duty to the entire populace of Washington to conduct the search reasonably – they merely owed a duty to Mr. Brutsche as the property owner. *See Garnett v. City of Bellevue*, 59 Wn. App. 281, 796 P.2d 782 (1990) (holding that public duty doctrine does not apply where police allegedly verbally abused plaintiff in public).

V. CONCLUSION

For the foregoing reasons, the ACLU respectfully submits that the Court of Appeals erred in adopting a categorical rule that the police owed no duty to Brutsche to execute a search warrant in a reasonable manner. The appellate court's ruling should be reversed, and this matter should be remanded for a trial of Brutsche's negligence cause of action. Respectfully submitted this 17th day of December 2007.

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Englehorn, Steve

From: Sanders, Justice Richard B.
Sent: Thursday, December 27, 2007 9:15 AM
To: Englehorn, Steve
Subject: FW: Initial Press Release- Bikini Judge Network (i.e. Ethics Court) opens for business and prepares it's 1st case which is to HEAR ON YOUTUBE.COM the "alleged" Hukabee Bird Assignment Case

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- Women Heterosexual JURIES (we need about 3 billion of you) ==> Must be ABLE TO SIGNON to YouTube.com and <http://www.TrustworthyVoting.com> and **CAST REAL TIME ONLINE votes** for your opinion as a JUROR in Ethics cases in 2008 and beyond.
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- Expert Witnesses
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- Attorney for the Respondent (or Pro-Se which means they can REPRESENT themselves)
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12/27/2007

If I forgot any "ETHICS" COURT ROLES that need to be FILLED (just let me know) and I will put out a VIDEO JOB ANNOUNCEMENT and see who applies VIA YouTube.com video.

Best regards,

Kevin Douglas Donahoe
CEO, Software Architect, and .Net Developer
KevinDonahoe@NewTechnologyAdvantage.com
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APPENDIX A

RULING CASE LAW

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oath or affirmation of the complaining party;⁸ and if it is issued on a statement of facts signed, but not sworn to, it is null and void.⁹ The affidavit must comply with the statutory requirements regulating the issuance of such writs,¹⁰ but it is not necessary that the information contain a distinct allegation of the commission of a felony. It is sufficient if it alleges reasonable grounds for suspecting a felony by the defendant.¹¹ It is also unnecessary that any complaint should be signed by the applicant, or that any minute should be made of the day, month, and year, when presented; or that any recognizance for cost should be given. These requirements are only necessary when a complaint is made which is intended to be the incipient step in a prosecution against anyone for an offense.¹² It is generally held that an affidavit is not sufficient if it is made on information and belief and is not corroborated or supported in any way,¹³ though the opposite conclusion has also been reached.¹⁴

11. Execution of Warrant.—The officer charged with the execution of a search warrant has authority to use force if necessary and therefore he may break open the doors if admittance to the premises is denied, and whether the goods are found or not, the officer and his assistants are justified. But as a general rule such a warrant can be executed only in the daytime.¹⁵ A demand is necessary prior to a breaking in of the doors only where some person is found in charge of the building to be searched.¹⁶ In executing the warrant the officer should do no unnecessary damage to the property, and no unnecessary injury to the feelings of those present at the time and in charge of the premises.¹⁷ Whether the conduct of the officer in a given case was reasonable or unreasonable must be determined by all the circumstances of that case. No definite line can be drawn. The division is rather by a zone within which reasoning men might reasonably differ, but outside of which there would be a general concurrence of reasoning, thinking men. The general principle, how-

8. *State v. Griswold*, 67 Conn. 290, Note: 46 L.R.A.(N.S.) 970.
 34 Atl. 1046, 33 L.R.A. 227; *State v. Derry*, 171 Ind. 18, 85 N. E. 765, 131 A. S. R. 237; *Rose v. State*, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228; *Buckley v. Beaulieu*, 104 Me. 56, 71 Atl. 70, 22 L.R.A.(N.S.) 819.
 Note: 11 L.R.A. 378.
 9. *Appling v. State*, 95 Ark. 185, 128 S. W. 886, 28 L.R.A.(N.S.) 548 and note.
 10. Note: 18 Ann. Cas. 819.
 11. *Jones v. German*, [1896] 2 Q. B. 418, [1897] 1 Q. B. 374, 65 L. J. M. C. 212, 66 L. J. Q. B. 281, 24 Eng. Rul. Cas. 1.
 12. *Chipman v. Bates*, 15 Vt. 51, 40 Am. Dec. 663.
 13. *State v. Magahey*, 12 N. D. 535, 97 N. W. 885, 1 Ann. Cas. 650 and note; *Rex v. Kehr*, 11 Ont. L. Rep. 517, 6 Ann. Cas. 612. And see *ARRIDAVITS*, vol. 1, p. 772.
 14. *Rose v. State*, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228 and note.
 15. *Gammon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 339; *Chipman v. Bates*, 15 Vt. 51, 40 Am. Dec. 663 and note.
 16. Note: 40 Am. Dec. 666.
 17. *Lutter v. Borden*, 7 How. 1, 12 U. S. (L. ed.) 581.

ever, is that, while the officers should search thoroughly in every part of the described premises where there is any likelihood that the object searched for may be found, they should also be considerate of the comfort and convenience of the occupants, should mar the premises themselves as little as possible, and should carefully replace, so far as practicable, anything they find it necessary to remove.¹⁸ An officer who makes a hole in the wall for the purpose of spying on the inmates of a building wherein intoxicating liquors and cigarette papers are sold illegally commits an unlawful act which subjects him to punishment.¹⁹ He must comply strictly with the directions contained in the warrant. If the warrant directs the seizure of a certain kind of property, a seizure of an entirely different kind constitutes the officer a trespasser.²⁰ But he will be justified in the seizure of goods under a warrant, though they were not those intended by the applicant, if they come within its description.¹ So he must be particular to follow the directions of the warrant with respect to the place to be searched. A warrant to search the dwelling house of a named person does not authorize the search of a house in the occupation of a third person, though it belongs to the person named in the warrant.² Authority to search in suspected places does not give a right to seize property that is on one's person or in his hands.³ In some states it is provided by statute that a search warrant cannot be executed in the nighttime, except on a showing therefor, and on special authority expressed in the warrant.⁴ The execution of a search warrant on Sunday was valid at common law and unless prohibited by statute the execution of the warrant on that day does not violate the rights of a suspected person.⁵

12. Return.—An officer who acts under a search warrant and seizes property must make return of all the things which he does, and which he is commanded to do, by the warrant. If he fails to make such a return, the warrant is no protection to him.⁶ But no return is required if the goods ordered seized are not found.⁷ An officer

18. *Buckley v. Beaulieu*, 104 Me. 56, 71 Atl. 70, 22 L.R.A. (N.S.) 819 and note; *Smith v. McDuffee*, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1918D 947. 3. *Dunn v. Lowe*, 203 Mass. 516, 89 N. E. 1046, 133 A. S. R. 326.

4. *Burroughs v. Eastman*, 101 Mich. 419, 59 N. W. 817, 45 A. S. R. 419, 24 L.R.A. 859. 5. *State v. Cornwall*, 96 Me. 172, 51 Atl. 373, 90 A. S. R. 331. See SUNDAYS AND HOLIDAYS.

19. *Cohn v. State*, 120 Tenn. 61, 109 S. W. 1149, 16 Ann. Cas. 1201, 17 L.R.A. (N.S.) 451. 6. *Anderson v. Cowles*, 72 Conn. 335, 44 Atl. 477, 77 A. S. R. 310 and note; *Getchel v. Page*, 103 Me. 387, 69 Atl. 624, 125 A. S. R. 307, 18 L.R.A. (N.S.) 253.

20. *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097, 87 A. S. R. 711. 7. *Chipman v. Bates*, 15 Vt. 51, 40 Notes: 40 Am. Dec. 666. 1. Note: 40 Am. Dec. 666. 2. *Larshet v. Forgay*, 2 La. Ann. 524, 46 Am. Dec. 554.

Notes: 40 Am. Dec. 666; 101 A. S. Am. Dec. 663. R. 331.

APPENDIX B

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Howard v. U.S.

E.D.Pa.,2000.

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.

Martina HOWARD

v.

UNITED STATES of America

No. 99-3865.

Aug. 28, 2000.

Frank T. Troilo, Wertheimer and Associates, Joseph M. Toddy, Zarwin, Baum, Devito, Kaplan & O'Donnell, P.C., Philadelphia, for Martina Howard, Colma Howard, H/W, Mamie Walters, Individually and as Parent and Natural Guardian of Darricka Woods, Plaintiffs.

Susan Dein Bricklin, U.S. Attorney's Office, Phila, for United States of America, United States Drug Enforcement Agency, Carmen J. Pino, John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, John Doe VI, John Doe VII, John Doe VIII, John Doe IX, John Doe X, John Doe XI, John Doe XII, John Doe XIII, Jane Doe, Defendants.

MEMORANDUM OPINION AND ORDER

WEINER, J.

*1 Plaintiff has asserted a series of claims against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq., arising from what plaintiff contends was an unlawful raid on her residence by agents of the Drug Enforcement Administration. Specifically, she has asserted claims for assault and battery, false imprisonment, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, property damage, illegal search and seizure in violation of the Fourth Amendment and for loss of consortium. Presently before the court is the motion of the defendant for summary judgment on the assault and battery, false imprisonment, negligence, intentional and negligent infliction of emotional distress and illegal search and seizure claims. For the reasons which follow, the motion is granted in part and denied in part.

In deciding a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, "the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled

to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir.1999) (citing Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir.1994)). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Furthermore, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 250.

On a motion for summary judgment, the facts should be reviewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, inc., 369 U.S. 654, 655 (1962)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita, 475 U.S. at 586, and must produce more than a "mere scintilla" of evidence to demonstrate a genuine issue of material fact and avoid summary judgment. See Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1373 (3d Cir.1992).

Defendant first seeks summary judgment on the illegal search and seizure claim. The facts relating to this claim are as follows: Carmen Pino ("Pino"), a Diversion investigator with DEA was investigating the illegal distribution of Dilaudid. In April of 1997, a Pauline Felder was arrested by DEA agents after having sold 100 Dilaudid tablets to a Paul Schantz. Ms. Felder informed the agents that she had obtained the Dilaudid tablets from her cousin, Martina "Felder" and was going to turn over the proceeds of the sale to her cousin. Pino ran Martina "Felder's" name through a DEA data base to determine 1) whether she was listed as being able to manufacture, distribute or dispense drugs, 2) to check a data base for utilities to make sure the house was in some way associated with "Martina" and 3) to run a criminal record check. Plaintiff Martina Howard's name was not found in the data base because she was neither a distributor and/or pharmacist. No other investigation was performed to substantiate Pauline Felder's

accusations. There is some dispute as to whether Pauline Felder's accusations were supported by a Warren Wooden in writing. However, this discrepancy is not material to the resolution of the issue before us. In any event, based upon the affidavit of Pino, which included the information obtained from Pauline Felder and Warren Woodson, a United States Magistrate signed a search warrant for the residence of plaintiff at 2338 N. Colorado Street, Philadelphia. Meanwhile, plaintiff had been diagnosed with lupus in 1988. She was prescribed medication, including Dilaudid, to control her condition. On the evening of April 23, 1997, 10 DEA agents and diversion investigators conducted a raid of plaintiff's residence. Although 101 Dilaudid tablets were found, neither this medication nor anything else was seized from the residence. Plaintiff claims Pino misrepresented facts and omitted other facts in the application for a search warrant in an attempt to keep information from the magistrate which would have influenced her decision to issue the warrant. Plaintiff also claims Pino applied for and executed the search warrant in a negligent manner.

*2 Unfortunately for plaintiff, a claim for illegal search and seizure arises directly under the Fourth Amendment and must be pursued in a *Bivens*-type action ^{FN1} against the individual DEA agents. *Wright v. United States*, 963 F.Supp. 7, 16 (D.D.C.1997). However, since plaintiff failed to make personal service on the individual agents, we had no choice but to dismiss plaintiff's *Bivens* claims.

FN1. Under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), parties have a cause of action against the individual law enforcement agents who are responsible for constitutional rights violations.

"Under the Federal Tort Claims Act, the United States may be held directly liable for the torts of its employees committed during the course of their employment." *Wright, supra* at 15. Specifically, 28 U.S.C. § 1346(b) provides in relevant part: ...the district courts...shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages,...for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The "law of the place" refers to the substantive law of the state where the wrongful conduct took place. See *FDIC V. Meyer*, 510 U.S. 471-477-78 (1994) In addition, courts have considered "under like circumstances" to mean that there must be a private analogue to the government's conduct. *Wright, supra* at 16-17; "[T]he discrete act of applying for a search warrant is not reviewable under the FTCA" since the act "has no analogous counterpart for private citizens." *Id.* See also, *Russ v. United States*, 62 F.3d 201, 204 (7th Cir.1995) citing *FDIC, supra* ("Because the 'law of the place' refers to state law, and state law cannot provide liability for the violation of a federal constitutional right, constitutional wrongs cannot be remedied through the FTCA.").

In addition, the actions of the agents in seeking a search warrant, even if the actions include misrepresenting and excluding facts in an affidavit to a Magistrate for a determination of probable cause, fall within the "discretionary function" exception to the FTCA, 28 U.S.C. § 2680(a). *Wright, supra* at 17.^{FN2} The function of identifying what evidence to submit to a judicial tribunal by a police officer or drug agent is a discretionary one even if evidence has been concealed and distorted. *Id.*; see also *Doherty v. United States*, 905 F.Supp. 54, 56 (D.Mass.1995) ("...the Court rules that the conduct of the deferral agents and the AUSA falls within the parameters of the discretionary function exception. First, the law enforcement personnel made a judgment based upon their discretion to seek a search warrant upon the information which they had at the time. Second, the decision was based upon the public policy of preventing crime by acting with expedition. The process of deciding how and when to seek a search warrant involves a judgment and a choice grounded in policy considerations regarding the enforcement of the criminal laws toward protecting the public safety. This type of decisionmaking is more than merely a ministerial act. The exception applies if there was room for choice based upon considerations of public policy. The purpose of the

exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort....The overwhelming consensus of federal case law establishes that criminal law enforcement decisions...investigative and prosecutorial alike-are discretionary in nature, and therefore, by Congressional mandate, immune from judicial review. Furthermore were negligence actionable under these circumstances, law enforcement tactics would become hesitant, apprehensive, and less effective.”) Finally, we note that 28 U.S.C. § 2680(h) prohibits “any claim arising out of ... misrepresentation or deceit.”Accordingly the United States of America is immune from suit for plaintiff's claims under the Federal Tort Claims Act of illegal search and seizure and negligence in applying for the search warrant.

FN2. That section provides that no claim shall be brought for “any claim based upon an act or omission of an employee of the Government... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused.”28 U.S.C. § 2680(a).

*3 Of course, the FTCA does create a right of action for torts committed during the unreasonable execution of a search warrant. See 28 U.S.C. § 2680(h). Here, plaintiff has asserted claims for assault and battery, false imprisonment, intentional and negligent infliction of emotional distress and negligence in executing the search warrant.

Plaintiff first claims the agents used excessive force when they executed the search warrant and that force amounted to an assault and battery. The facts taken from the depositions of plaintiff and her husband, Colma Howard, are not in dispute. Colma Howard opened the door and approximately 10 DEA agents came in with guns drawn. While some of the DEA agents were wearing masks, all were wearing jackets that said “DEA” on them. Martina Howard and Colma Howard were directed to lie on the floor. Martina Howard was forced to lie on the floor for five minutes until the agents learned that Martina

suffered from lupus, at which point she was allowed to sit on the couch. Colma Howard was forced to lie on the floor for approximately 15 to 20 minutes. No one touched any of the inhabitants of the house with the exception of one agent placing his hand on Martina's shoulder when he told her to lie on the floor. Seven agents went upstairs and escorted Marina's daughter from the bathtub to downstairs. At this point the agent's guns were no longer pointed at the inhabitants. Martina was then shown the warrant and was told that the agents were looking for Dilaudid. Martina took the agents upstairs where she showed the agents her Dilaudid which was counted out and put back into the medicine bottles. The agents poked at the ceiling tiles and cracked the glass in the ceiling light, but did not do any other damage to the premises. Before they left, one of the agents told the plaintiff that he was sorry that they had to conduct the search, but when they receive this kind of information, they have to do the search. The agents did not pat any members of the premises down. Nor did they yell at the members or use any foul language.

Based on these undisputed facts, we find that the DEA agents did not engage in excessive force as a matter of law. In Pennsylvania, excessive force is defined as “the amount of force which could cause serious bodily injury.”Commonwealth of Pennsylvania v. Biagini, 540 Pa. 22, 36, n.9 (Pa.1995). Other than the testimony that one of the agents put his hand on her shoulder when directing her to lie on the floor, plaintiff simply did not testify that the agents subjected the plaintiff or any members of her family to any physical force. Plaintiff does not contend that any one was handcuffed or physically restrained. Moreover, forcing the occupants to lie on the floor and pointing guns at the occupants was reasonable for the agents to secure the scene while the house was searched.^{FN3} Plaintiff has simply failed to present any evidence from which a jury could conclude that the agents actions amounted to excessive force.

FN3. Plaintiff argues that because there was never a valid search warrant, then the touching and detention of plaintiff was automatically unlawful and that she has therefore established claims for assault and

battery and for false imprisonment. However, here the agents in entering the plaintiff's residence did so pursuant to a warrant issued by a neutral and detached Magistrate based on probable cause. In *United States v. Leon*, 468 U.S. 879 (1984), the Supreme Court made it clear that even in the context of excluding evidence in a criminal trial, the officers could rely, in good faith, upon a warrant issued by a neutral and detached Magistrate, which was later determined to be invalid. As long as the agents reasonably relied on and acted pursuant to a search warrant issued by a neutral and detached magistrate, this court cannot disregard the effect of such a search warrant *at the time the agents entered the plaintiff's residence* even if the warrant were ultimately found to have been improperly issued.

*4 We also find as a matter of law that plaintiff was not falsely imprisoned. "A warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 101 S.Ct. 2587, 2595 (1981). The reason for the detention is to prevent flight in the event incriminating evidence is found and to minimize the risk of harm to the searching officers and to prevent efforts to conceal or destroy evidence when narcotics are the subject of the search. For these reasons, it was necessary to detain plaintiff and the other occupants while the agents secured the home. See also *Cole v. United States*, 874 F.Supp. 1011, 1043 (D.Neb.1995) (because "false imprisonment" was authorized by a valid search warrant in light of *Summers*, there is no recovery under the FTCA).

We next turn to the plaintiff's claim for intentional infliction of emotional distress. Under Pennsylvania law, plaintiff must show that the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible grounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. See, *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir.1979); *Restatement (Second) of Torts*, § 46,

comment d.

After obtaining a search warrant for plaintiff's home, DEA agents came into her home with guns drawn and had plaintiff lie on the floor for five minutes and her husband lie on the floor for 15 to 20 minutes. Without physical contact, raised voices or foul language, they conducted a search that lasted approximately one hour and fifteen minutes. They did not damage the house other than breaking a ceiling light and some ceiling tiles. We find nothing in these facts that was so outrageous as to be considered atrocious and utterly intolerable in a civilized community. Accordingly, we find as a matter of law that there was no intentional infliction of emotional distress by the defendant.

In order to prove a claim for negligent infliction of emotional distress in Pennsylvania, plaintiff must prove (1) that the agents acted negligently, (2) that plaintiff either suffered a physical impact or was within the "zone of danger" of the action of the agents and (3) that plaintiff suffered emotional distress that was "serious and verifiable." *Jones v. Howard University, Inc.*, 589 A.2d 419, 424 (1991).

With regard to the first element, plaintiff has submitted a report from her expert, Pierre A. Charette, which she claims details the negligence of the agents in executing the warrant. With regard to the second and third elements plaintiff has submitted the report of Martin Cooper, M.D., which states that plaintiff not only suffered an aggravation to her lupus condition, but also developed severe skin rashes all of which resulted in her having to be hospitalized for two weeks. For these reasons, we find summary judgment is inappropriate on plaintiff's claim for negligent infliction of emotional distress.

*5 For similar reasons, we find that summary judgment is inappropriate on plaintiff's claim for negligence in executing the search warrant.

An appropriate Order follows.

ORDER

The motion of the defendant for summary judgment is GRANTED in part and DENIED in part.

Judgment is ENTERED in favor of defendant and against the plaintiff on plaintiff's claims brought under the Federal Tort Claims Act for illegal search and seizure, negligence in applying for the warrant, excessive force in the form of assault and battery, false imprisonment and intentional infliction of emotional distress.

Plaintiff's claims for negligent infliction of emotional distress, for negligence in executing the search warrant and for damage to property and loss of consortium shall remain.

The Court strongly suggests that the parties attempt to resolve the remaining claims. In the event the parties are unsuccessful, trial of the remaining claims will commence on Monday, September 18, 2000 in Courtroom 6b, United States Courthouse, 601 Market Street, Philadelphia, Pa.

IT IS SO ORDERED.

E.D.Pa., 2000.

Howard v. U.S.

Not Reported in F.Supp.2d, 2000 WL 1272590
(E.D.Pa.)

END OF DOCUMENT

Wood v. Kitsap County
W.D.Wash.,2007.

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
at Tacoma.

Douglas WOOD and Sandra Karlsvik, husband and
wife, Plaintiffs,

v.

KITSAP COUNTY; West Sound Narcotics
Enforcement Team; Officer Matthew Dougil
(WestNET); GIG Harbor Police Department;
Detective John Doe Schuster (WestNET) Detective
John Halsted (POULSBO Police Dept., WestNET,
Badge # 606); Detective G.R. Mars (WSP Statewide
Incident Response Team, Badge # 685); Detective
John Doe Wilson and John Does 1-25, Defendants.

No. C05-5575RBL.

May 3, 2007.

Mark Leemon, Leemon & Royer PLLC, Seattle, WA,
for Plaintiffs.

Jeffrey D. Stier, Attorney General's Office, Olympia,
WA, for Defendants.

ORDER GRANTING AND DENYING
DEFENDANTS' MOTIONS FOR SUMMARY
JUDGMENT

RONALD B. LEIGHTON, United States District
Judge.

I. INTRODUCTION

*1 This matter comes before the Court on Motions for Summary Judgement by Defendants Schuster, Halsted, and Dougil,^{FN1} Dkt. # 42, and Defendant Washington State Patrol (WSP), Dkt. # 50.^{FN2} Plaintiffs Douglas Wood and Sandra Karlsvik sued the Defendants ^{FN3} under § 1983, § 1988, the Fourth Amendment, and the Fourteenth Amendment, as well as the common law of torts, for the Defendants' actions of obtaining and executing a search warrant. Defendants suspected Plaintiffs were growing marijuana on their property. Plaintiffs claim that Defendants violated their civil rights because they lacked probable cause to obtain the warrant and because the manner in which they executed the search on September 5, 2002, was unreasonable and involved excessive force.

FN1. This Court entered an Order on Stipulation dismissing Defendant Schuster on February 16, 2007, Dkt. # 77. Consequently, this Order does not address Schuster, and all further references to the Schuster, Halsted, and Dougil Motion for Summary Judgment will be to Halsted and Dougil.

FN2. Washington State Patrol's Motion includes, but is not limited to, Defendants George R. Mars and Detective Orest Wilson. All further references in this Order will be to WSP.

FN3. Plaintiffs voluntarily dismissed Defendant Kitsap County on May 30, 2006, Dkt. # 32. WestNET is not a legal entity and is therefore not a proper defendant. See Hervey v. Estes, 65 F.3d 784, 791-92 (9th Cir.1995).

Halsted and Dougil ask this Court to grant summary judgment, arguing that they are entitled to qualified immunity because (1) they did not violate Plaintiffs' constitutional rights; (2) even if they did violate Plaintiffs' constitutional rights, a reasonable police officer faced with the same circumstances would have believed the Defendants' conduct to be lawful. Defendant WSP argues that (1) it is entitled to qualified immunity; (2) that it did not violate Plaintiffs' Fourteenth Amendment rights; (3) that it did not violate Plaintiffs' Fourth Amendment rights because its search of Plaintiff Wood and his residence was conducted pursuant to a search warrant obtained by a third party; and (4) that it did not have a duty to determine whether Plaintiff Wood's marijuana use was legal pursuant to RCW 69.51 A prior to searching his residence or arresting him.

II. FACTS

Taken in the light most favorable to Plaintiffs, the non-moving party, the relevant facts are as follows:

Plaintiffs Douglas Wood and his wife Sandra Karlsvik are residents of Fox Island, Pierce County, Washington. Title to Plaintiffs' home is held by

Organic Sunflower Foundation Inc. Wood originally held title to the property, but he deeded title to Solar Steam Inc. in 1989. In 1995, Solar Steam Inc. deeded title to Organic Sunflower Foundation Inc.

Defendant Officer Dougil is an officer with the Gig Harbor Police Department. Defendant Officer Halsted is an officer with the City of Poulsbo Police Department. Dougil, Halsted, and the WSP were part of WestNET, a multi-jurisdictional drug task force, at the time the events occurred..

In 1998, an informant heard from friends that Plaintiffs were growing marijuana on their property. The informant attempted to steal some marijuana, but Plaintiff Wood caught him and turned him into the police. The informant had a criminal record, and Defendant Officer Dougil, the officer who spoke with the informant, stated that the informant was credible “[o]nly in that he was knowledgeable about drugs and marijuana. He knew what marijuana was and looked like because he had been involved in it.... He was there to steal marijuana plants, the way he described them. That's about all the credibility I gave him at that point.”According to Wood, officers inspected Plaintiffs' home but did not find any marijuana. The police report regarding the incident noted that Plaintiffs were installing a motion sensor alarm on their property.

*2 In 2001, Officer Dougil received an anonymous tip via a marijuana hotline that the informant (who was seemingly a different individual than the informant in 1998) drove into Plaintiffs' driveway while looking for an address and observed two men unloading marijuana plants from the bed of a truck. However, the driveway to Plaintiffs' home ends a significant distance from the home, and Plaintiffs claim that “one could not drive up to the residence without first traveling over an open [field.]” Pl. Resp. 4.

On August 27, 2002, Officer Dougil and Detective Schuster flew over Plaintiffs' property in a MD 500 helicopter at an altitude of 700 feet. Both officers claim to have spotted marijuana growing on Plaintiffs' property, and they took numerous photographs of the scene. Prior to flying over Plaintiffs' residence, Detective Schuster had

completed aerial marijuana spotter school. Officer Dougil was in the process of completing the school at the time he flew over Plaintiffs' property.

On August 29, 2002, Officer Dougil sent an email to Officer Halsted. In that email, Dougil explained that Plaintiffs' neighbors told Dougil that they heard gunfire coming from the direction of Plaintiffs' property.

On September 3, 2002, Defendant Officer Halsted submitted a Complaint for a Search Warrant to search Plaintiffs' residence for marijuana and related paraphernalia.^{FN4} A Kitsap County Superior Court judge issued the requested warrant.

^{FN4}. The evidence provided in support of the Complaint for the Search Warrant is discussed infra Part III.B.

On September 5, 2002, at around 6:00 a.m., Dougil, Halsted, approximately 10 officers from WSP's SIRT Team, and a number of other officers from WestNET arrived at Plaintiffs' residence to serve the search warrant. Initially, officers were unable to determine how to get into Plaintiffs' home; they described it as a “fortress-like” structure. Wood soon came to an upstairs window, and the officers ordered him to show his hands. He complied. Wood states that he was afraid the officers were going to shoot him because they had their weapons pointed at him. Wood eventually came downstairs and opened the door, allowing the officers access to his home. Trooper Wilson handcuffed Wood upon entering the home.

Wood claims that even though one of the officers “was designated to ‘Knock and Announce,’ and plans had been made for one of the SIRT team members to announce their presence over a loud speaker, neither of these took place.”Pl. Resp. 7.

Wood claims that even though he opened the upstairs door for the officers, other officers attempted to break into his house by smashing his downstairs door and breaking a window. Wood claims Officer Mars is responsible for breaking a window. Wood claims he asked the officer with him to tell the other officers to stop banging on his house and breaking windows, but

the officer refused to do so. Additionally, Wood claims that officers unnecessarily pried a door open with a pry bar when they could have simply opened it. Although the door did not have a regular door handle on it, the officers could have opened the door by pulling a rope that hangs by the door which disengages the door latch. The door was not locked. Moreover, Wood claims that the door does have a handle on the inside and that officers were already inside his house when the officers pried the door open from the outside; thus, the officers inside the house could have simply opened the door, thereby eliminating the need for the officers outside the house to pry the door open.

*3 WSP claims that they encountered three growling dogs upon entering Plaintiffs' home and that they had to use a pepper ball gun to protect themselves. However, Wood claims that the dog they shot was an eleven year old golden retriever who could not go up and down stairs. After being shot with the pepper ball gun, the dog was permanently blind in one eye.

Officers found a patch of marijuana growing behind Plaintiffs' house. Wood claims he grows the marijuana for medical purposes; he uses it for treatment of a condition from which he suffers called trigeminal neuralgia. Wood explained this to the officers and produced a handwritten note from his wife, a physician, concerning her advice about use of medical marijuana. The note stated, "I am advising that Mr. Doug Wood consume oral cannabis t.i.d. for a neurological disorder with pain and anorexia," and was signed by Sandra Karlsvik. Wood claims he also gave the officers documentation recommended by the Washington State Medical Association. According to Wood, the officers were unconcerned with the specifics of the documentation and instead tried to determine whether Wood possessed more than a 60-day supply of marijuana as authorized by the Medical Marijuana statute, RCW 69.51A.

Wood claims that after this discussion was over, he heard someone yell, "Fire," from downstairs, and all the officers ran out of the house. Someone rushed Wood out of the house as well. Wood asked if his house was on fire, and he was told it was not, but he saw a cloud of what appeared to be smoke coming from the lower level of his home. He heard one of the

officers say the cloud was CN, a type of tear gas. Wood claims that the gas left a white residue on everything in the lower level of his house, which was very difficult to remove. Plaintiffs thoroughly cleaned their home before moving back in, as they feared there were toxic chemicals in their house, and they had to throw everything made of cloth away because they could not remove the white residue.

Officer Halsted believed that the note produced by Wood authorizing his medical marijuana use did not comply with the Medical Marijuana statute and that Wood had more marijuana than allowed under the statute. Consequently, Officer Halsted arrested Wood.

While waiting for someone from the Pierce County Sheriff's Office to pick Wood up to transfer him to jail, an officer removed Wood's handcuffs so he could urinate. Wood's injured dog came up to Wood, and Wood leaned down to comfort her. Wood then claims an officer picked him and forcibly slammed him face first into the hood of a SUV. Wood again reached out to his injured pet and was slammed into the hood several more times. Wood claims no one offered to get medical help for his dog; instead, the officers offered only to take the dog to the pound. Wood declined the offer.

Wood was later booked into the Pierce County Jail.^{FNS}

^{FNS} Wood was charged with unlawfully manufacturing and possessing a controlled substance, but all charges were subsequently dropped because Wood provided sufficient medical marijuana documentation.

Officer Dougil participated in the execution of the search warrant by securing the back perimeter of Plaintiffs' home, and claims that he had no contact with Plaintiffs or their dogs during the execution and that he did not enter Plaintiffs' home until Wood had been detained and taken from the property.

A. Summary Judgment Standard

*4 Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving

party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. FRCP 56(c); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir.2000) (citations omitted). Once the moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving party fails to present, by affidavits, depositions, answer to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir.1995). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In other words, "summary judgment should be granted where the non-moving party fails to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor." Triton Energy Corp., 68 F.3d at 1220.

B. Probable Cause in Obtaining the Warrant- Defendants Dougil and Halsted

Qualified immunity is not simply a defense to liability; it instead provides a defendant with immunity from suit. Saucier v. Katz, 533 U.S. 194, 200 (2001). In determining whether this Court should grant the Defendants qualified immunity, the court must address two issues: (1) taken in the light most favorable to the Plaintiffs, whether the alleged facts show that the Defendants violated the Plaintiffs' constitutional rights; and (2) if so, whether that constitutional right was clearly established. Id. at 201. This second inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id.

The qualified immunity standard " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " Hunter v. Bryant, 502 U.S. 224, 229 (1991) (citing Malley v. Briggs, 475 U.S. 335, 341, 343 (1986)).

For this Court to deny Dougil and Halsted qualified immunity on the issue of probable cause, Plaintiffs

must show that Dougil and Halsted "submitted an affidavit that contained statements [they] knew to be false or would have known to be false had [they] not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements." See Liston v. County of Riverside, 120 F.3d 965, 972 (9th Cir.1997) (citing Branch v. Tunnell, 937 F.2d 1382, 1387 (9th Cir.1991)). Specifically, plaintiffs must "(1) make a 'substantial showing' of deliberate falsehood or reckless disregard for the truth and (2) establish that, but for the dishonesty, the challenged action would not have occurred." Id. at 973 (citing Hervey v. Estes, 65 F.3d 784, 788-89 (9th Cir.1995)).

*5 Plaintiffs claim that "[p]ractically all of the material statements made in the application for the search warrant" were "inaccurate and/or misleading." Pl. Resp. 8. The evidence supporting the application for the search warrant, dated September 3, 2002, included the following:

- In 1998, Officer Dougil spoke with an informant who attempted to steal marijuana from Plaintiffs' residence. The informant had heard from teenage friends that Plaintiffs were growing marijuana on their back porch; however, when the informant arrived at Plaintiffs' residence, he found marijuana growing under the deck. The informant's attempt to steal the marijuana was thwarted by Wood, who caught him and handed him over to the Pierce County Sheriff's Office.
- In the report regarding the informant's arrest, the Pierce County Sheriff's Office noted that Plaintiff Wood was installing a motion sensor alarm on his property.
- In 2001, Officer Dougil received a tip from the Marijuana Hotline that the tipster was lost and drove into Plaintiffs' driveway looking for an address, and observed two males unloading marijuana plants from the bed of a truck.
- On August 27, 2002, Officer Dougil and Detective Schuster flew over Plaintiffs' property in a helicopter at an altitude of 700 feet. Both observed marijuana plants on the south side of the residence. Both Dougil and Schuster had completed aerial marijuana spotters school and had made aerial observations of marijuana prior to flying over Plaintiffs' property.
- Officer Dougil was told by Plaintiffs' neighbors that they had heard automatic gunfire coming from

Plaintiffs' property.

- The title to Plaintiffs' residence is held by Organic Sunflower Foundation Inc. Plaintiff Wood originally held title to the property, and in 1989, deeded it to Solar Steam Inc. In 1995, Solar Steam Inc. deeded the property to Organic Sunflower Foundation Inc. Officer Halsted believed that Plaintiff Wood owned both organizations. He also stated that, based on his previous investigations of marijuana growers, "they commonly place properties, assets and public records under fictitious names."

Compl. for Search Warrant at 2-4 (Ex. 1 in Decl. of Mark Leemon).

Plaintiffs dispute the accuracy of some of this information. For example, Wood disputes that Organic Sunflower Foundation Inc. and Solar Steam Inc. are fictitious entities. Decl. of Douglas Wood 5. However, whether the information in the search warrant application is in fact false is not the appropriate inquiry in determining whether the officers had probable cause; instead, this Court must examine whether, in light of the clearly established law and the information the officers possessed at the time, the officers could have reasonably believed they had probable cause. Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citations omitted). That some of the information later turned out to be false is, by itself, insufficient to support a finding that the officers violated Plaintiffs' constitutional rights.

*6 However, if Plaintiffs can make a "substantial showing" that Dougil and Halsted deliberately or recklessly disregarded the truth in the application for the search warrant, the shield of qualified immunity may be lost. Plaintiffs claim a number of factual inaccuracies and omissions meet this "substantial showing."

First, Officer Halsted stated in the application for the search warrant that Officer Dougil told him that "neighbors in the area have heard automatic gunfire sounds coming from the suspects [sic] property." Compl. for Search Warrant at 3 (Ex. 1 in Decl. of Mark Leemon). However, Officer Dougil stated in an email drafted on August 29, 2002, that another officer had told him that he regularly heard gunfire "*coming from the direction of* " Plaintiffs'

property, not that the gunfire was definitely coming from Plaintiffs' property as claimed in the application for the search warrant. Additionally, Officer Dougil reiterated in his deposition that another officer had told him only that he had heard gunfire coming "from the direction of" Plaintiffs' property but was never more specific than that. Matthew Dougil Dep. 11: 7-11, Oct. 3, 2006 (Ex. 4 in Decl. of Mark Leemon). Plaintiffs claim that Defendants intentionally misrepresented this fact in the application for the search warrant.

Second, Plaintiffs point out that the informant who provided information in 1998 was someone who had had run-ins with the police on several occasions; was involved in illegal drug activity; and according to Officer Dougil, was credible "[o]nly in that he was knowledgeable about drugs and marijuana. He knew what marijuana was and looked like because he had been involved in it.... He was there to steal marijuana plants, the way he described them. That's about all the credibility I gave him at that point." Matthew Dougil Dep. 9:22-10:19, Oct. 3, 2006 (Ex. 4 in Decl. of Mark Leemon). None of this information was included in the application for the search warrant.

Finally, Plaintiffs point out that Officer Dougil stated in his deposition that he was unsure whether he had in fact completed the aerial marijuana training school prior to flying over Plaintiffs' property or whether he was in the process of completing the training at the time he flew over Plaintiffs' property. However, in the application for the search warrant, Officer Halsted stated, "Both Detective Schuster and Officer Dougil have completed aerial marijuana spotters school. Both officers have spotted over 100 marijuana plants in various locations from both fixed wing and rotary wing aircraft." Detective Schuster's Declaration reiterates that he had completed marijuana spotting school and had spotted marijuana over 100 times from the air, but Officer Dougil's declaration does not contain a similar claim.

Together, Plaintiffs claim that these factual misstatements and omissions meet the required "substantial showing" under the first prong of test for denying Dougil and Halsted qualified immunity.

*7 Dougil and Halsted respond, in part, by arguing

that the police's observation of Wood growing marijuana on his property was sufficient in itself to provide probable cause. See United States v. Hammett, 236 F.3d 1054, 1059 (9th Cir.2001). Plaintiffs do not challenge the constitutionality of the aerial observation of the marijuana growing on Plaintiffs' property. See California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (holding that an individual does not have a reasonable expectation that his or her garden is protected from aerial police observation). However, Plaintiffs do challenge whether Dougil had completed sufficient training to be able to identify marijuana from an altitude of 700 feet, or at least whether Halsted accurately represented Dougil's ability to do so in the application for the search warrant.^{FN6}

FN6. Plaintiffs argue in their Response that Officer Dougil stated in his deposition, "Frankly from 700 feet, I couldn't tell what was down there but that it was green." However, Dougil and Halsted point out in their Reply that the comment was actually a rhetorical statement made by Plaintiffs' counsel during Dougil's deposition, not a comment by Dougil. Matthew Dougil Dep. 26: 9-10, Oct. 3, 2006 (Ex. 4 in Decl. of Mark Leemon).

Plaintiffs have failed to satisfy their burden of making a "substantial showing" that Dougil and Halsted deliberately or recklessly disregarded the truth in the application for the search warrant. Plaintiffs present no evidence that Halsted intentionally lied in the warrant application. Although Halsted failed to include some arguably relevant information in the warrant application, Plaintiffs have failed to establish that the omissions were material. "In determining materiality, '[t]he pivotal question is whether an affidavit containing the omitted material would have provided a basis for a finding of probable cause.' " United States v. Chavez, 306 F.3d 973, 979 (9th Cir.2002) (citing United States v. Garcia-Cruz, 978 F.2d 537, 541 (9th Cir.1992)). For example, even though Halsted failed to include in the application that Dougil thought the informant was credible only to the extent he was knowledgeable about marijuana, the addition of that information does not lead to the conclusion that the warrant was issued without

probable cause.

To the contrary, even assuming that Plaintiffs have made a "substantial showing" that Dougil and Halsted deliberately or recklessly disregarded the truth of these facts as claimed by Plaintiffs, Plaintiffs have failed to satisfy the Court probable cause was otherwise lacking. Even if Halsted misrepresented Dougil's training in the warrant application, there is no dispute that Schuster did have experience in aerial marijuana spotting and that he spotted marijuana growing on Plaintiffs' property. This fact alone is sufficient to support issuance of the warrant. See United States v. Hammett, 236 F.3d 1054, 1059 (9th Cir.2001). Thus, regardless of whether other information contained in the warrant application was false or misleading or whether additional information should have been included, a sufficient basis still existed for finding probable cause. Because probable cause existed to support issuance of the warrant, Dougil and Halsted did not violate Plaintiffs' constitutional rights. Therefore, Dougil and Halsted have qualified immunity as to Plaintiffs' lack of probable cause claims..

C. Probable Cause for Warrant-WSP

*8 WSP claims it played no part in obtaining the warrant for the search of Plaintiffs' residence, and Plaintiffs do not dispute this. In fact, Plaintiffs make no argument as to why WSP should be held liable in connection with the warrant or the issue of probable cause; instead, Plaintiffs focus solely on the role WSP played in executing the warrant and carrying out the search of Plaintiffs' property. Therefore, to the extent Plaintiffs may have had a claim against WSP regarding issuance of the warrant or probable cause, the Court grants WSP qualified immunity on that issue.

D. Reasonableness of the Search Under the Fourth Amendment-WSP

In determining whether the Defendants WSP used excessive force in executing the search warrant and arresting Wood, the Court must review the Defendants' actions under the Fourth Amendment's objective reasonableness standard. Graham v. Connor, 490 U.S. 386, 395 (1989). "Determining

whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interest at stake." *Id.* at 396 (citations omitted). The reasonableness of the force used by the officers "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). Thus, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397 (citing *Scott v. United States*, 436 U.S. 128, 137-39 (1978)). This includes an examination of "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Robinson v. Solano County*, 278 F.2d 1007, 1014 (9th Cir.2002) (citing *Graham*, 490 U.S. at 397).

Plaintiffs claim that Defendants' "extreme show of paramilitary force" was unreasonable and violated Plaintiffs' Fourth Amendment rights. Pl. Response at 10. Defendants do not dispute that Wood was seized under the Fourth Amendment; they argue only that the force used was reasonable under the circumstances.

Plaintiffs have presented the Court with sufficient evidence to support their claim that the force used by Defendants WSP was unreasonable under the Fourth Amendment.

The Court concludes that the present case is similar to *Robinson v. Solano County*, 278 F.3d 1007. In *Robinson*, the court held that the defendant officers used excessive force by pointing their guns at the head of the plaintiff when the plaintiff was obviously unarmed and the plaintiff was approaching the officers in a peaceful way.^{FN7} *Id.* The officers were investigating whether the plaintiff committed, at most, a misdemeanor, and the defendants outnumbered the plaintiff. *Id.* Moreover, there were no dangerous or exigent circumstances apparent at the time the defendants detained the plaintiff. 278

F.3d at 1014. The court concluded the force the defendants used was excessive even though the plaintiff had been armed with a shotgun earlier that day that he used to shoot a neighbor's dog. *Id.*

FN7. However, the court went on to hold that even though the defendants used excessive force in violation of the Fourth Amendment, they were nonetheless entitled to qualified immunity because the law regarding when an officer may reasonably point his gun at the head of a suspect was not clearly established at the time of the incident. *Id.* at 1013.

*9 Similarly, in this case, an examination of the force used in connection with the facts known to the Defendants at the time of executing the warrant shows that the force used by Defendants was not necessarily reasonable as a matter of law. They broke a window and pried open a door, damaging it, when other officers had already entered the residence through a different door. They shot Plaintiffs' dog in the face with a pepperball gun, claiming that the dog was aggressive, yet Plaintiff describes the injured pet as an eleven year old dog who could not go up and down stairs. And most importantly, Defendants allegedly released some sort of tear gas in Plaintiffs' house when Wood was already detained and Defendants seemingly had no reason to do so. There was no one else in the house, and the Defendants had already shot Plaintiffs' dog with the pepper ball gun; thus, the dogs posed no threat to the officers. Defendants make no argument as to why they released the tear gas into Plaintiffs' home. Finally, Wood claims he was forcibly slammed into the hood of a SUV when he was trying to comfort his injured dog while waiting to be transported to the Pierce County Jail. Again, Plaintiff appeared to present no threat of harm to the officers, but instead was simply trying to comfort his pet.

The crime Defendants were investigating, unlawful manufacturing and possession of a controlled substance and possession of a firearm, is a felony. They had reason to believe Plaintiffs could be armed, based on the sounds of gunfire coming from the direction of Plaintiffs' property. However, neither of the Plaintiffs had any criminal history, and Wood did

not resist arrest. In fact, he opened his the door to his home, allowing the officers to come inside. Defendants immediately handcuffed Wood upon entering the house, therefore eliminating any threat Wood may have posed. Once the officers realized that they secured the residence and that no one else was present, it would be unreasonable to release tear gas into Plaintiffs' residence, even if they were investigating a felony that potentially involved a firearm.

Finding that the Defendants' use of force was unreasonable is only the first step under *Saucier*. Next, the Court must determine whether the constitutional right Defendants violated was clearly established. *Saucier*, 533 U.S. at 201. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir.2005) (citing *Saucier*, 533 U.S. at 202). There does not have to be a case specifically holding that the officers' conduct at issue is unconstitutional for the Court to find the constitutional right was clearly established; instead, the law must simply provide the officers with "fair warning" that the conduct was unconstitutional. *Id.* at 975 (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The law at the time the Defendants acted was sufficiently clear that Defendants knew, or should have known, that "unnecessarily destructive behavior, beyond that necessary to execute [the] warrant effectively, violates the Fourth Amendment." *Id.* at 974 (citing *Liston*, 120 F.3d at 979).

*10 The Court is satisfied that the right Plaintiffs seek to vindicate is a clearly established constitutional right. In *Mena v. City of Simi Valley*, the court affirmed the district court's denial of qualified immunity when the defendants unnecessarily broke down two doors that were unlocked, and one particular officer kicked a door that was already open and said, "I like to destroy these kind of materials, it's cool." *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir.2000). Because the Defendants "appear[ed] to have damaged Plaintiffs' property in a way that was 'not reasonably

necessary to execute [the] search warrant,' " they were not entitled to qualified immunity. *Id.*

Similarly, in this case, taking the facts in the light most favorable to the Plaintiffs, Defendants unnecessarily broke Plaintiffs' window and pried open a door, damaging the surrounding wood, when other officers were already in the house and when the Defendants could have simply opened the door. Additionally, Defendants released some kind of tear gas into Plaintiffs' home which left a white residue on everything, requiring Plaintiffs to throw away anything that was cloth, as the residue could not be cleaned. A reasonable officer would have known that such conduct was unlawful. *See id.*

E. Reasonableness of the Search Under the Fourth Amendment-Dougil and Halsted

There is no evidence that Dougil or Halsted engaged in any of the conduct giving rise to Plaintiffs' excessive force claims. The WSP carried out the entire execution of the search warrant; Dougil and Halsted provided only perimeter support. Plaintiffs claim that Dougil and Halsted are directly responsible for the alleged excessive force because they initiated the investigation and were responsible for obtaining the search warrant. Although a defendants can be held liable under § 1983 if he or she sets in motion a "series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury," *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir.1986), there was no reason for Dougil and Halsted to know that the WSP would use excessive force in executing the warrant. Therefore, the Court grants Dougil and Halsted qualified immunity on the issue of the reasonableness of the search under the Fourth Amendment.

F. Fourteenth Amendment Claim-Dougil, Halsted, and WSP

To state a claim under the Fourteenth Amendment, Plaintiffs must allege that Defendants engaged in conduct that "shocks the conscience," as the Fourteenth Amendment only protects individuals against "arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 846 (1998) (citations omitted). In explaining the types of claims

that fail to meet this high standard, the Court has said,

We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficient shocking conduct and have held that the Constitution does not guarantee due care on the part of its officials; liability for negligently inflicted harm is categorically beneath the threshold of the Constitutional due process.

*11*Id.* at 848-49.

Although Plaintiffs have presented sufficient evidence to support their claim that WSP violated Plaintiffs' constitutional rights in executing the search, Plaintiffs have failed to allege facts that "shock the conscience." *Cf. Rochin v. California*, 342 U.S. 165 (1952) (finding that the forced pumping of a suspect's stomach violated due process). Therefore, Dougil, Halsted, and WSP have qualified immunity with respect to Plaintiffs' Fourteenth Amendment claims. *See Saucier*, 533 U.S. at 201.

IV. CONCLUSION

For the reasons explained above, the Court GRANTS Dougil's and Halsted's Motion for Summary Judgement, Dkt. # 42, and grants them qualified immunity on all of Plaintiffs' claims. The Court GRANTS WSP's Motion for Summary Judgement and Qualified Immunity, Dkt. # 50, with respect to the issue of probable cause in obtaining the warrant and Plaintiffs' Fourteenth Amendment claims, but DENIES the Motion with respect to Plaintiffs' Fourth Amendment claim against WSP.

W.D.Wash.,2007.

Wood v. Kitsap County

Slip Copy, 2007 WL 1306548 (W.D.Wash.)

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CDiaz v. City of New York

E.D.N.Y., 2006.

Only the Westlaw citation is currently available.

United States District Court, E.D. New York.

Wanda DIAZ, Moises Santana, Gilberto Diaz, Tanairi, an infant, and Moises Santana, Jr., an infant, the infants by their parent and guardian Wanda Diaz, Plaintiffs,

v.

CITY OF NEW YORK, P.O. Angelo Burgos, Shield # 17545 and Unidentified New York City Police Officers, Defendants.

No. 00-CV-2944 (JMA).

Dec. 29, 2006.

Jennifer C. Friedrich, Lewis Johs Avallone Aviles, LLP, Melville, NY, Attorney for Plaintiffs.

Michael A. Cardozo, Corporation Counsel of the City of New York, by Leticia J. Santiago, Assistant Corporation Counsel, Julia Chung Katten Muchin Rosenman LLP New York, NY, Attorney for Defendants.

MEMORANDUM AND ORDER

AZRACK, United States Magistrate Judge.

*1 Plaintiffs Wanda Diaz, Moises Santana, Gilberto Diaz, Tanairi Rios, and Moises Santana, Jr. bring this action against the City of New York, police officer Angelo Burgos, and "Unidentified New York City Police Officers" alleging violations of their civil rights under 42 U.S.C. § 1983 ("Section 1983") and New York law. More specifically, plaintiffs allege that defendants violated their Fourth Amendment rights by conducting an illegal search and seizure, using unreasonable force, and unlawfully destroying plaintiffs' property. Plaintiffs further allege that defendants have interfered with their constitutional right to family integrity under the Ninth Amendment. Plaintiffs claim that a captain supervising the officers conducting the search should be liable for failing to supervise the officers, and that the City of New York is liable for a policy and custom that led to the violations attributed to the officers. Plaintiffs further claim that defendants failed to intervene to prevent these alleged constitutional violations. And finally, plaintiffs allege that defendants committed assault and battery, false arrest, and the negligent hiring, supervising and training of officers under New York law.

By motion dated July 15, 2005, defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The parties consented to have

a United States Magistrate Judge preside over this case for all purposes, including entry of judgment, pursuant to 28 U.S.C. § 636(c). Viewing the evidence in a light most favorable to the plaintiffs, I grant summary judgment as to plaintiffs': (1) Fourth Amendment claims of unlawful search and seizure and unlawful detention; (2) Ninth Amendment claims of interference with family integrity; (3) Supervisory Liability claim; (4) *Monell* claim against defendant City of New York; and (5) New York State false arrest and negligent hiring, supervision and training claims. I deny summary judgment on plaintiffs': (1) Fourth Amendment claims of excessive force, destruction of property and failure to intervene; and (2) New York State assault and battery claims. In addition, I find that summary judgment should not be granted based on the individual officers' claim of qualified immunity to these surviving claims.

I. FACTS

The following facts are taken from the parties' Local Civil Rule 56.1 Statements and the Declaration of Wanda Diaz, and are undisputed unless otherwise noted. On February 16, 2006, New York City Police Officer Angelo Burgos obtained a search warrant for 879 Bergen Street, Apartment 12A, in Brooklyn, New York based on information provided by a confidential informant ("CI"). (Defs.' Rule 56.1 Stmt. ¶ 1.) According to Burgos' affidavit, the CI had observed Moises Santana selling drugs out of the apartment, and had observed a large quantity of heroin currently in the apartment. (*Id.* ¶ 2.) Based on conversations with the CI, Burgos believed that heroin trafficking was taking place at 879 Bergen Street, Apartment 12A. (*Id.* ¶ 3.) A State Supreme Court Justice granted a "no knock" warrant for a search of 879 Bergen Street based on Officer Burgos' affidavit and the testimony of the CI. (*Id.* ¶ 7; *Id.* Ex. 3) The "no knock" provision was approved because the evidence sought in the warrant, heroin, could be disposed of quickly. (*Id.* ¶ 8.)

*2 On February 23, 1999 at approximately 7:30 pm Officer Burgos, along with other police officers and an Emergency Service Unit ("ESU"), arrived at 879 Bergen Street to execute the warrant. (Defs.' Rule 56.1 Stmt. ¶ 9.) Officer Burgos pointed ESU to the door of Apartment 12A and waited in the stairwell while ESU executed the entry. (*Id.* ¶ 10.) Once ESU secured the apartment, they gave the officers an "all clear" signal and the officers, including Burgos, entered the apartment. (*Id.* ¶ 12.)

Wanda Diaz was at home with the father of her children, Moises Santana, Sr., and her children Tanairi Rios and Moises Santana, Jr., when her door was forced open with a loud crashing noise as police officers entered the apartment. (Declaration of Wanda Diaz "Diaz Declaration" ¶¶ 3-4.) Moises Santana, Sr. and Wanda Diaz were handcuffed. (Defs.' Rule 56.1 Stmt. ¶ 13.) Diaz described that a police officer "pushed me to the floor with his knee in my back" when she was handcuffed. (Diaz Declaration ¶ 5.) The officers "were yelling and screaming at me to get down on the floor [sic] mixed with obscenities" and "stuck a shot gun in my face and told me to 'Stay still!'" (Diaz Declaration ¶ 6.) Diaz also contends that the officers repeatedly struck her on her legs with the end of the shot gun. (Diaz Declaration ¶ 6.) The officers then "put the shot gun to my head and yelled 'Tell me where the fucking drugs are,' to which she responded 'I don't know what you are talking about.'" (Diaz Declaration ¶ 7.) Diaz states that she was bleeding from her right knee as a result of being pushed onto the floor. (*Id.* ¶ 7.)

Diaz saw Santana, Sr. in the kitchen with red beams of light on his forehead, and believed them to be targeting lights for firearms; "I thought we were all going to be shot and die." (*Id.* ¶ 9.) The children remained in their bedroom during the search and only came out briefly so that the officers could search their bedroom. (Defs.' Rule 56.1 Stmt. ¶ 15.) The defendants contend that a female officer was present with the children during the search, but Diaz disputes that claim. (Defs.' Rule 56.1 Stmt. ¶ 14; Diaz Declaration ¶ 11.) Diaz asked if she could see her children, explaining that one of her sons suffered from a debilitating asthma condition, but the officers refused. (Diaz Declaration ¶¶ 5, 9.) Diaz then asked if her handcuffs could be loosened because she was beginning to lose feeling in one of her arms, but the officers refused. (*Id.* ¶ 12.) She claims that Officer Burgos took her into the bathroom and "continuously slammed the back of [her] head into the wall," while screaming at her. (*Id.* ¶ 13.) She also states that he threatened to take away her children, and call the Welfare Department. (*Id.*)

The officers searched the apartment. (Defs.' Rule 56.1 Stmt. ¶ 16.) Diaz and Moises, Sr. informed the officers that there was \$4,700.00 in cash in the apartment, and when the officers could not find it they grabbed Moises,

Sr. and screamed for him to show them where the money was being held. (Diaz Declaration ¶ 15.) Moises, Sr. then showed the officers where the cash was hidden. (*Id.*) When Burgos asked Santana to whom the money belonged, Santana stated that it belonged to him. (Defs.' Rule 56.1 Stmt. ¶ 17.) After further inquiry, Burgos learned that Santana was on public assistance. (Defs.' Rule 56.1 Stmt. ¶ 18.) Lieutenant Mihnovich then instructed Burgos to take the money for forfeiture proceedings because Santana could not account for it. (Defs.' Rule 56.1 Stmt. ¶ 18.)

*3 Diaz alleges that she and Moises, Sr. were held on the couch for two hours, and then held standing in their bedroom for two more hours. (Diaz Declaration ¶ 16.) She also contends that the officers "made a mess" and destroyed personal property and furniture, including her platform bed. (*Id.* ¶ 19.) A police captain arrived approximately five hours after the search began, and Diaz claims that "the physical and verbal abuse stopped" once he arrived. (*Id.* ¶ 20.) Diaz heard the captain say "This was a false alarm." (*Id.*) Diaz claims that the children were crying, scared and upset, and Moises, Jr. said he was having trouble breathing so Diaz gave him an oxygen treatment. (Diaz Declaration ¶ 21.)

Burgos took photographs of the apartment, and told Santana and Diaz to come to the precinct to receive copies of the receipt for the money taken from the apartment. (Defs.' Rule 56.1 Stmt. ¶¶ 20-21; *See* Defs.' Memo. in Supp. of Summ. J. Ex. 8) Diaz and the children went to Interfaith Hospital, and Diaz claims that she suffered leg pain from being struck with the shot gun, her right knee was swollen, she had limited range of motion, and she was unable to sleep. (Diaz Declaration ¶ 22.) Diaz claims that she "continues to seek psychiatric treatment," she is "scared of everyone and everything," and she "dropped out of school and [is] scared to go outside." (Diaz Declaration ¶ 23.)

II. DISCUSSION

1. Summary Judgment Standard

The standard for granting summary judgment is well established. Summary judgment should be granted only "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”Fed.R.Civ.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). “[T]he burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists,” Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223 (2d Cir.1994), but “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). “An issue of fact is ‘material’ for these purposes if it ‘might affect the outcome of the suit under the governing law,’ “ while “[a]n issue of fact is ‘genuine’ if ‘the evidence is such that a reasonable jury could return a verdict for the non-moving party.’ “ Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 97 (2d Cir.2000) (quoting Anderson, 477 U.S. at 248).

In determining whether any material facts are in dispute, the court “must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.” Am. Cas. Co. of Reading, Pa. v. Nordic Leasing, Inc., 42 F.3d 725, 728 (2d Cir.1994) (quoting Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 572 (2d Cir.1993)); see also Anderson, 477 U.S. at 255. To defeat a properly supported motion for summary judgment, the non-moving party must “ ‘set forth specific facts showing that there is a genuine issue for trial.’ “ Matsushita, 475 U.S. at 587 (quoting Fed.R.Civ.P. 56(e)). The non-moving party, however, “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Id.* at 586 (citations omitted). Mere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment. See Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir.1998); Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir.1996). The non-moving party must come forth with “significant probative evidence” demonstrating that a factual dispute does in fact exist. Anderson, 477 U.S. at 249. “If the evidence is merely colorable, or is not significantly probative, summary judgment may be

granted.” *Id.* at 249-250 (citations omitted).

2. Section 1983

*4 Plaintiffs seek to recover from defendants under 42 U.S.C. § 1983. To establish liability under Section 1983, plaintiffs must show that (1) the defendants acted under color of state law and (2) as a result of the defendants' actions, the plaintiffs suffered a deprivation of rights secured by the Constitution and laws of the United States. Annis v. County of Westchester, 136 F.3d 239, 245 (2d Cir.1998); Eagelson v. Guido, 41 F.3d 865, 872 (2d Cir.1994); Lehman v. Kornblau, 134 F.Supp.2d 281, 287 (E.D.N.Y. 2001). Section 1983 creates no substantive rights, but “provides remedies for deprivations of rights established elsewhere.” Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985) (plurality opinion).

Here, the fact that the officers acted “under color of state law” is not disputed, because the actions giving rise to the plaintiffs' claims were committed by police officers in the course of their duties. See Davis v. City of New York, 373 F.Supp.2d 322, 329 (S.D.N.Y.2005) (defendants acting in their capacity as police officers were “clearly acting ‘under color of state law.’ ”) Therefore, the discussion will focus on the second element-whether as a result of the defendants' actions, the plaintiffs suffered a deprivation of their Constitutional rights.

A. Fourth Amendment Claims

Plaintiffs make several claims that relate to the entry and search of their apartment. Specifically, the plaintiffs claim that the defendants violated their Fourth Amendment rights by an unlawful search and seizure, the unnecessary destruction of property and the unlawful use of force. Defendants argue that they are entitled to summary judgment as to these claims.

1) Illegal Search and Seizure

Plaintiffs base their illegal search and seizure claim on their allegations that the officers “unreasonably and unnecessarily” searched and seized the plaintiffs' property, that the plaintiffs “remained in handcuffs for over five hours while the officers searched a small two-

bedroom apartment,” and that they were “verbally, mentally and physically abused by the officers during the five hours of restraint and confinement.”^{FN1}(Pls.' Memo. in Opp. to Summ. J. 6.)

^{FN1}. The alleged verbal, mental and physical abuse by the officers will be addressed in the excessive force section of this decision.

Under the Fourth Amendment, the Warrant Clause requires that, absent certain exceptions, police obtain a warrant from a neutral and detached magistrate to search a person's home. See Franks v. Delaware, 438 U.S. 154, 164 (1978). A magistrate issuing a warrant must make a probable cause determination based on the “totality of the circumstances,” by making a commonsense decision based on the information set forth in the affidavit before him. See Illinois v. Gates, 462 U.S. 213, 238 (1983) (where an informant's tip corroborated by a sworn statement by an affiant was sufficient probable cause for a warrant.) A “no knock” warrant may be obtained to search for contraband drugs. See Richards v. Wisconsin, 520 U.S. 385, 395 (1997) (holding that “knock and announce” when executing a search warrant is not needed where officers reasonably suspect that evidence might be destroyed).

*5 The plaintiffs' illegal search claim fails because defendants had a facially valid warrant based on probable cause. The officers' entry into and search of the plaintiffs' residence was lawful pursuant to a valid search warrant approved by a New York State Supreme Court Justice. The Justice's decision was based on Officer Burgos' sworn affidavit as to his conversations with the CI, as well as the CI's statement to the judge. In addition, the “no knock” provision was approved because narcotics could be disposed of quickly. Thus, the entry into and search of the plaintiffs' apartment was lawful pursuant to a valid search warrant and did not violate their constitutional rights.^{FN2}

^{FN2}. The cases cited by the plaintiff for the propositions that police have *limited* authority to enter a dwelling in which a suspect lives, Payton v. New York, 445 U.S. 573, 603 (1980), and that police must reasonably believe that the suspect is present to enter a dwelling, United States v. Terry, 702 F.2d 299 (2d

Cir.1983) and United States v. Lauter, 57 F.3d 212 (2d Cir.1995), are not applicable here because they address *arrest* warrants, whereas this case considers a *search* warrant.

Even should plaintiffs contend that the warrant was issued on less than probable cause, their arguments would fail. A plaintiff who argues that a warrant was issued on less than probable cause faces a heavy burden. Rivera v. United States, 928 F.2d 592, 602 (2d Cir.1991). Where a magistrate has found that an affidavit presented to him showed that there was probable cause for the issuance of a warrant, the person challenging the affidavit must make a “substantial preliminary showing” that the affiant knowingly and intentionally, or with reckless disregard to the truth, made a false statement in his affidavit and that this false statement was “necessary to the finding of probable cause.” Rivera, 928 F.2d at 604 (quoting Franks, 438 U.S. at 155-56). Plaintiffs have offered no evidence that the affiant made a false statement to the judge. Plaintiffs' conclusory statement that the officers “illegally entered and searched” their home is not enough to overcome summary judgment on this claim.

The plaintiffs' assertions that their detention during the duration of the search was unreasonable is also without merit. The Supreme Court has held that a search warrant for a house “implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.” Michigan v. Summers, 452 U.S. 692, 705 (1981); see also Rivera v. United States, 928 F.2d 592, 606 (2d Cir.1991). The “risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.” Summers, 452 U.S. at 705. The detention of the occupants must be limited, however, and must be “substantially less intrusive” than an arrest. *Id.* at 702. “Thus, a detention ... is constitutional so long as the means used to effectuate it are as minimally intrusive as possible to achieve the end of securing the home, preventing flight from the premises and ensuring the safety of officers and occupants.” Barlett v. City of New York, 03-CV-1961, 2005 WL 887112, at *8 (E.D.N.Y. Feb 11, 2005), citing United States v. Pichardo, 92-CR-354, 1992 WL 249964, at *5 (S.D.N.Y. Sept. 22, 1992). The circumstances surrounding the detention must be

viewed “through the eyes of a reasonable and cautious police officer on the scene guided by his experience and training.” United States v. Barlin, 686 F.2d 81, 87 (2d Cir.1982). Furthermore, officers have authority to use handcuffs during the duration of a search for contraband. Meuhler v. Mena, 544 U.S. 93, 93 (2005).

*6 Defendants contend that their search lasted “approximately two hours,” (Defs.’ Memo. in Supp. of Summ. J. 3) while plaintiffs allege that the search lasted five hours. (Diaz Declaration ¶¶ 16, 20.) In executing the subject warrant the officers were within lawful authority to detain and handcuff plaintiffs while conducting their lawful search. The search was not unnecessarily long or intrusive: once the search was completed, the plaintiffs were immediately released, and the officers vacated the premises. In sum, the search was according to law, and thus summary judgment is granted to defendants as to the plaintiffs’ illegal search and seizure claims.

ii) Excessive Force

Plaintiffs also contend that defendants used excessive force when an officer handcuffed Diaz tightly, pushed her to the floor, struck her on the legs with a shot gun, and hit her head against the bathroom wall, and when officers “brutally grabbed” Moises, Sr. Even if lawfully detained, a person has a constitutional right to be free from the use of excessive force. Graham v. Connor, 490 U.S. 386, 394 (1989). All claims that law enforcement officers used excessive force in the course of a search are analyzed under the Fourth Amendment “reasonableness standard.” Graham, 490 U.S. at 395. The pertinent inquiry is “whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* at 397. “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment.” *Id.* at 396 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.1973)). Officers may not, however, gratuitously inflict pain in a manner that is not a reasonable response to the circumstances. Amnesty America v. Town of West Hartford, 361 F.3d 113, 124 (2d Cir.2004). The use of force beyond what is reasonably necessary to prevent violence or the destruction of evidence violates the Fourth

Amendment. Bolden v. Village of Monticello, 344 F.Supp.2d 407, 419 (S.D.N.Y.2004).

Diaz’s allegations that she was pushed to the floor, an officer repeatedly struck her on her legs with the end of a shot gun, and an officer “continuously slammed the back of [her] head against the wall” and Moises Sr.’s allegation that he was “brutally grabbed” are sufficient to overcome summary judgment on their excessive force claims. See Robison v. Via, 821 F.2d 913, 923-24 (2d Cir.1987) (summary judgment denied where officer pushed plaintiff against car, threw her against the fender, and twisted her arm behind her back). Even though these officers were conducting a search for contraband drugs and were forced to make split-second decisions, there were no allegations that Diaz or Moises, Sr., were armed, dangerous or a flight risk. Given the unresolved factual issues surrounding the force the officers used in effectuating the search, I deny summary judgment on the excessive force claims.

iii) Destruction of Property

*7 Plaintiffs also claim that the officers destroyed their property during the search of their residence. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even if the entry itself was lawful. U.S. v. Ramirez, 523 U.S. 65, 71 (1998). However, it is well recognized that “officers executing search warrants on occasion must damage property in order to perform their duty.” Cody v. Mello, 59 F.3d 13, 16 (2d Cir.1995) (internal citation omitted). Before an officer can be liable for property damage resulting from a lawful search, the plaintiff must establish that the police acted unreasonably or maliciously in bringing about the damage. Notice v. Koshes, 386 F.Supp.2d 23, 27 (D.Conn.2005).

Plaintiffs claim that photographs taken during the search reflect “the destruction of the platform bed located in the master bedroom, dismantled/destroyed furniture leaning up against the living room walls, and the contents of drawers and cabinets broken and placed on top of appliances, covering every usable surface in the home.” (Pls.’ Memo. in Opp. to Summ. J. 5; See Defs.’ Memo. in Supp. of Summ. J. Ex. 8) In fact, most of these photographs illustrate damage or disarray consistent with a reasonable search for narcotics and

narcotics paraphernalia. Three of the photographs, however, are less than clear, and therefore a genuine issue of material fact is raised as to whether unnecessary damage resulted from the officers' search. Viewing the evidence in a light most favorable to the plaintiffs, if the officers did indeed destroy the plaintiffs' platform bed, furniture and cabinets, a jury could find this damage unreasonable under the circumstances. Therefore, summary judgment is not appropriate as to the destruction of property claim.

B. Ninth Amendment-Family Integrity

Plaintiffs claim that defendants violated their Ninth Amendment rights by interfering with their family integrity. The integrity of the family unit has been found to be protected under the Ninth Amendment. *See Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). In *Griswold*, the Supreme Court concluded that the Ninth Amendment "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." *Griswold*, 381 U.S. at 492. However, the Ninth Amendment is "a rule of construction, not one that protects any specific right, and so "[n]o independent constitutional protection is recognized which derives from the Ninth Amendment and which may support a § 1983 cause of action." *Williams v. Perry*, 960 F.Supp. 534, 540 (D.Conn.1996) (quoting *Rini v. Zwirn*, 886 F.Supp. 270 (E.D.N.Y.1995)). Moreover, plaintiffs' submissions contain no facts or arguments to support their Ninth Amendment claim. Thus, summary judgment is granted as to the plaintiffs' Section 1983 claim based upon a right to family integrity under the Ninth Amendment.

C. Supervisory Liability

*8 Plaintiffs allege that an unidentified "Captain" who was supervising the officers conducting the search should be liable for failing to supervise or remedy the officers' unconstitutional practices. "Once the Captain entered the plaintiffs' home," plaintiffs claim, he "had the plaintiffs released from their handcuff confinement and the abuse stopped." (Pls' Memo. in Opp. to Summ. J. 6-7.) Therefore, "[t]he Captain and defendants should be held liable for the action of its officers." *Id.*

The Second Circuit has found that supervisory liability under Section 1983 "can be shown in one or more of the following ways: (1) actual direct participation in the constitutional violation (2) failure to remedy a wrong after being informed through a report or appeal (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such policy or custom to continue (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring." *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003), citing *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir.2003).

Plaintiffs have provided no evidence that the captain participated in any constitutional violation, was informed of the wrongful acts alleged by the plaintiffs, created or allowed a custom or policy amounting to a constitutional violation, negligently supervised his subordinates, or failed to act on information indicating that unconstitutional acts were occurring.^{FN3} Plaintiffs have simply failed to set forth any specific facts showing a genuine issue for trial on this issue. *See Federal Rule of Civil Procedure 56(e)*. For this reason, defendants' motion for summary judgment as to plaintiffs' supervisory liability claim is granted.

FN3. This Court is incredulous that after discovery the plaintiffs were not able to identify the name of the "Captain" allegedly involved in this episode. The issue of whether this violates Federal Rule of Civil Procedure 4(m), which requires the service of process on all defendants within 120 days of filing the complaint, *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34 (2d Cir.1996) (where court found individual officers should have been named as defendants in civil rights action), will not be addressed because the supervisory liability claim is dismissed on the above grounds.

D. Monell

A municipality may be liable for the actions of its officers under Section 1983. "It is when execution of a government's policy or custom, whether made by its

lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” Monell v. New York City Dep’t of Social Services, 436 U.S. 658, 694 (1978); see also Patterson v. County of Oneida, 375 F.3d 206, 226 (2d Cir.2004). Thus, to impose liability on a municipality, the plaintiff must prove that a municipal policy or custom caused a deprivation of the plaintiff’s rights. See Wimmer v. Suffolk County Police Dep’t, 176 F.3d 125, 137 (2d Cir.1999). A municipality may not, however, be held liable under a general theory of *respondeat superior*. Monell, 436 U.S. at 694-95.

To establish the existence of a municipal policy or custom, the plaintiff must allege (1) the existence of a formal policy officially endorsed by the municipality, (2) actions taken or decisions made by an official with final decision making authority, (3) a practice so persistent and widespread that it constitutes a custom, or (4) a failure by policymakers to properly train or supervise their subordinates, amounting to a “deliberate indifference” to the rights of those who come in contact with the municipal employees. David v. Lynbrook Police Dep’t, 224 F.Supp.2d 463, 478 (E.D.N.Y. 2002); Moray v. City of Yonkers, 924 F.Supp. 8, 12 (S.D.N.Y.1996). “[A] single incident in a complaint, especially if it involved only actors below the policy-making level, does not suffice to show a municipal policy. DeCarlo v. Fry, 141 F.3d 56, 61 (2d Cir.1998) (quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir.1991)).

*9 In the instant case, plaintiffs’ *Monell* claim is based on the same assertion as that of the supervisory liability claim: that “once the Captain entered the plaintiffs’ home” he “had the plaintiffs’ released from their handcuff confinement and the abuse stopped.” (Pls.’ Memo. in Opp. to Summ. J. 6-7.) Other than this assertion, there is no claim that the unidentified captain was an official with final decision-making authority. In addition, the record is devoid of any facts that establish the existence of a policy endorsed by the municipality, a practice so persistent it constituted a custom, or a failure by policymakers to adequately train or supervise their subordinates. In order to survive summary judgment, the plaintiff’s case cannot rest on mere allegations of its pleading, but must set forth specific

facts showing there is a genuine issue for trial. See Anderson, 477 U.S. at 248. Accordingly, defendant New York City’s motion for summary judgment is granted on the *Monell* claim. See Danielak v. City of New York, 02-CV-2349, 2005 WL 2347095, at *14 (E.D.N.Y. Sept. 26, 2005) (granting summary judgment on plaintiff’s *Monell* claim because plaintiff failed to allege a governmental custom or policy); citing Hazan v. City of New York, 98-CV-1716, 1999 WL 493352, at *2 (S.D.N.Y. Jul. 12, 1999).

E. Failure to Intervene

Plaintiffs further allege that defendants are liable for having failed to intervene to prevent the constitutional violations they claimed occurred. A police officer has an affirmative duty to intercede on behalf of a citizen whose constitutional rights are being violated in his presence by other officers. Ricciuti v. New York City Trans. Authority, 124 F.3d 123, 129 (2d Cir.1997) (quoting O’Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir.1988)). An officer cannot, however, be found liable for failure to intervene unless (1) “such failure permitted fellow officers to violate a suspect’s clearly established statutory or constitutional rights of which a reasonable person would have known” and (2) the failure to intervene was “under circumstances making it objectively unreasonable for him to believe that his fellow officers’ conduct did not violate those rights.” Ricciuti, 124 F.3d at 129. In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring. Anderson v. Branen, 17 F.3d 552, 557 (2d Cir.1994).

Because this Court has found that genuine issues of material fact exist as to whether defendants violated plaintiffs’ constitutional right to be free of excessive force and unnecessary destruction of property, only these claims are considered for the failure to intervene discussion. It is clear that a person has a clearly established statutory or constitutional right to be free from excessive force and unnecessary destruction of their property. See Graham v. Connor, 490 U.S. 386, 394 (1989) (excessive force); U.S. v. Ramirez, 523 U.S. 65, 71, (1998) (destruction of property). In viewing the facts in a light most favorable to the plaintiffs and assuming these facts to be true (as the Court must), no reasonable officer in the searching officers’ position

could have thought that it was appropriate to use the amount of force alleged to be used, and commit the type of property destruction alleged to have taken place. Disputes of fact over what happened during this search make it impossible to conclude as a matter of law that no reasonable officer in their position would have known that rights were being violated. Therefore, plaintiffs' failure to intervene claims cannot be disposed of on summary judgment, and the motion is denied as to this claim.

3. State Law Claims

A. Assault and Battery

*10 Plaintiffs bring state law claims against defendants for assault and battery. An "assault" is an intentional placing of another person in fear of imminent harmful or offensive contact; a "battery" is an intentional wrongful physical contact with another person without consent. United Nat. Ins. Co. v. Waterfront New York Realty Corp., 994 F.2d 105, 108 (2d Cir.1993). With respect to actions undertaken by law enforcement officers discharging their official duties, an assault or battery takes place only if the officers used greater force than was necessary under the circumstances. Paulino v. U.S., 94-CV-6453, 1996 WL 457303, at *5 (S.D.N.Y. Aug. 13, 1996), citing Jones v. State, 33 N.Y.2d 275, 279, 352 N.Y.S.2d 169 (N.Y.1973).

Viewing the evidence in a light most favorable to the plaintiffs, the defendant officers handcuffed Diaz tightly, pushed her to the floor with a knee in her back, struck her on the legs with a shot gun, and hit her head against the bathroom wall. In addition, Moises, Sr. claims he was "brutally grabbed" by officers. There is no allegation by the defendants that Diaz or Moises, Sr. were violent or were resisting arrest. The question of whether the officers engaged in these activities, or used more force than was necessary, is a question of fact. Therefore, on the basis of this limited information before the Court, these claims cannot be dismissed, and summary judgment is denied.

B. False Arrest

To establish a cause of action for false arrest, the plaintiff must show that (1) the defendant intended to

confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. See Broughton v. State of New York, 37 N.Y.2d 451, 456, 373 N.Y.S.2d 87 (N.Y.1975), cert. denied 423 U.S. 929, 96 S.Ct. 277 (1975); see also Lee v. City of New York, 272 A.D.2d 586, 586, 709 N.Y.S.2d 102, 103 (N.Y.App.Div.2000). A false arrest claim fails if the underlying detention occurred during a search pursuant to a warrant predicated on probable cause. Johnson v. City of New York, 05-CV2357, 2006 WL 2354815, at *3 (S.D.N.Y. Aug. 14, 2006), citing Michigan v. Summers, 452 U.S. 692, 705 (1981). Here, the plaintiffs were detained by the police during the execution of a valid search warrant. Furthermore, since the warrant was issued by a judge, a presumption of probable cause for the detention exists. Lee, 272 A.D.2d at 586, citing Broughton, 37 N.Y.2d at 458. Therefore, defendants are granted summary judgment on the false arrest claim.

B. Negligent Hiring and Training

Plaintiffs claim that defendant New York City was negligent in hiring and training the police officers that conducted the search of the Diaz home. When an employee is acting within the scope of her employment, the employer may be held liable for the employee's negligence only under a theory of *respondeat superior*, and not under a theory of negligent hiring or retention. See Griffin v. City of New York, 287 F.Supp.2d 392, 397-98 (S.D.N.Y.2002), citing Karoon v. New York City Transit Authority, 659 N.Y. S.2d 27, 27 (N.Y.App.Div.1997). This is the case because if the employee was not negligent, there is no basis for liability, but if the employee was negligent, the employer will be liable regardless of the reasonableness of the hiring or the adequacy of the training. See Karoon, 659 N.Y.S.2d at 27. Because it is undisputed that the defendant officers were acting within the scope of their employment when they conducted the search, the plaintiffs' claims for negligent hiring and training fail as a matter of law, and summary judgment is granted.

4. Qualified Immunity

*11 In addition to arguing that the plaintiffs' claims

should be rejected on the merits, the defendant officers also contend that they are, in any case, entitled to qualified immunity. Government officials performing discretionary functions have qualified immunity that shields them from civil damages liability as long as their actions could reasonably have been thought consistent with rights they have allegedly violated. Anderson v. Creighton, 483 U.S. 635, 638 (1987) (internal citations omitted). The Supreme Court has established a two-part inquiry to determine whether qualified immunity bars a suit against a government official. The court must first consider whether the facts alleged, when taken in the light most favorable to the party asserting the injury, demonstrate a violation of a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). Next, the court must ask whether the officials' actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Hope v. Pelzer, 536 U.S. 730, 739 (2002).

As discussed above, the plaintiffs have put forth sufficient evidence to raise a material issue of fact as to whether the officers used excessive force, unnecessarily destroyed their property, and failed to intervene to prevent these violations from taking place. See, *supra*, sections 2(A)(iii) and (iv). Thus, the relevant question is whether a reasonable officer could have believed that these actions were lawful in light of the law and the information the officers possessed. See Hunter v. Bryant, 502 U.S. 224, 227 (1991).

Regarding the excessive force claim, viewing the evidence in a light most favorable to the plaintiffs, a reasonable officer would have known that pushing Diaz to the floor, striking her on the legs with a shot gun, and hitting her head against the bathroom wall violated her right to be free of excessive force. Therefore, summary judgment will not be granted based on qualified immunity for this claim. See Smith v. Fields, 95-CV-8374, 2002 U.S. Dist. LEXIS 3529, at *22 n. 9 (S.D.N.Y. Mar. 1, 2002) (allegation that plaintiff was "slapped and kicked about the face sufficient to defeat claim of qualified immunity at summary judgment stage); Nogue v. City of New York, 98-CV3058, 1999 U.S. Dist. LEXIS 13201, at *31 (E.D.N.Y. Aug. 27, 1999) (allegation that officer kicked and punched him while on the ground defeats claim of qualified

immunity at summary judgment stage).

As to the destruction of property claim, if the plaintiffs' claims of malicious destruction of property are true, and the Court must assume that they are, it would be clear to a reasonable officer that this conduct was unlawful in the situation he confronted, for there would be no reason for an officer to maliciously destroy a platform bed, furniture, and cabinets in a search for contraband. Therefore, the defendants are denied summary judgment based on qualified immunity as to this claim. Finally, with regard to the failure to intervene claim, because questions of fact remain as to the extent of the force used and amount of property destroyed in the search, issues of fact also remain as to whether a reasonable officer would have known that failing to intervene was unlawful in the circumstances. In sum, defendants will not be granted qualified immunity based on the plaintiff's excessive force, destruction of property and failure to intervene claims.

III. CONCLUSION

*12 For the foregoing reasons, summary judgment is granted as to plaintiffs' (1) Fourth Amendment claims of unlawful search and seizure; (2) Ninth Amendment claims of interference with family integrity; (3) *Monell* claims against defendant City of New York; and (4) New York State false arrest and negligent hiring, supervision and training claims. Summary judgment is denied as to plaintiffs' (1) Fourth Amendment excessive force, destruction of property and failure to intervene claims; and (2) New York State assault and battery claims. In addition, summary judgment will not be granted based on the individual officers' claim of qualified immunity to these surviving claims.

SO ORDERED.

E.D.N.Y., 2006.

Diaz v. City of New York

Not Reported in F.Supp.2d, 2006 WL 3833164 (E.D.N.Y.)

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Henning v. County of Sacramento

E.D.Cal.,2006.

Only the Westlaw citation is currently available.

United States District Court,E.D. California.

Adrienne HENNING, Plaintiff,

v.

COUNTY OF SACRAMENTO, et al., Defendants.

No. Civ S-05-0531 FCD KJM PS.

Nov. 17, 2006.

Adrienne G. Henning, Sacramento, CA, pro se.

Jesse M. Rivera, Jonathan B. Paul, Shanan Lee Hewitt,
Moreno and Rivera, Sacramento, CA, for Defendants.

FINDINGS AND RECOMMENDATIONS

KIMBERLY J. MUELLER, Magistrate Judge.

*1 Defendants' motion for summary judgment is pending before the court. Upon review of the documents in support and opposition, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

In this action, plaintiff alleges claims under 42 U.S.C. § 1983 arising out of a search of her home by officers of the Sacramento County Sheriff's Department. The search followed the arrest of plaintiff's son at her home. The County and Sheriff's Department move for summary judgment, contending plaintiff cannot identify any policy that caused plaintiff to suffer a constitutional deprivation. A municipality may only be found liable under § 1983 for violation of an individual's constitutional rights when official policy " 'causes' an employee to violate another's constitutional rights." Monell v. Department of Social Services, 436 U.S. 658, 692, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Plaintiff fails to adduce any evidence of an official policy giving rise to the constitutional violation alleged here and at deposition could not identify any such policy. Deposition of Adrienne Henning at 119:25-121:20. Summary judgment should therefore be granted for the municipal defendants.

The individual defendants move for summary judgment on the ground they are entitled to qualified immunity. "Government officials enjoy qualified immunity from civil damages unless their conduct violates 'clearly established statutory or constitutional rights of which a

reasonable person would have known.' " Jeffers v. Gomez, 267 F.3d 895, 910 (9th Cir.2001) (per curiam) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The threshold question for a court required to rule on the qualified immunity issue is whether the facts alleged, taken in the light most favorable to the plaintiff, demonstrate that the defendants' conduct violated a statutory or constitutional right. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If no such right would have been violated were the plaintiff's allegations established, "there is no necessity for further inquiries concerning qualified immunity." *Id.* If, on the other hand, a statutory or constitutional right was violated, the court must inquire "whether the right was clearly established." *Id.* Summary judgment based on qualified immunity is appropriate if the law did not put the defendants on notice that their conduct would be clearly unlawful. *Id.* at 202.

Because qualified immunity is an affirmative defense, the burden of proving the defense lies with the official asserting it. Harlow, 457 U.S. at 812; Houghton v. South, 965 F.2d 1532, 1536 (9th Cir.1992); Benigni v. City of Hemet, 879 F.2d 473, 479 (9th Cir.1989). Where the official moves for summary judgment on a qualified immunity defense, the official bears the initial burden of establishing the absence of a genuine issue of fact on issues material to the affirmative defense. Houghton, 965 F.2d at 1537.

Defendants contend they are entitled to qualified immunity because plaintiff's son was a resident of plaintiff's house and was on formal searchable probation at the time of the incident. Thus, defendants argue, the warrantless search of plaintiff's home was not unreasonable. Defendants argument misapprehends the gravamen of plaintiff's complaint. Plaintiff not only contests the entry into her home; in both the complaint and opposition, plaintiff objects to the manner in which the search was conducted and the associated destruction of her property.

*2 The "touchstone of the Fourth Amendment is reasonableness," which "is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (quoting Florida v. Jimeno, 500 U.S. 248,

250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991)). "Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful" United States v. Ramirez, 523 U.S. 65, 71, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998). Here, plaintiff alleges her window blinds and curtains were torn and thrown on the floor, papers, mail and pictures were cast about, her carpet was ruined with blood, bedrooms other than her son's were searched and the doors thereto-and every other door in the house-severely damaged, plaintiffs velvet and silk bedding and pajamas were ruined and her brand new luggage torn and ripped. Compl. at 3:16-4:2; *see also* Deposition of Adrienne Henning at 66, 86-87, 130, 133, 136, 176-178, 181-184. Whether it is reasonable to conduct a search of plaintiff's premises after her son was in custody in such a manner that, among other things, her designer bedding and pajamas were destroyed by the defendants' K-9 dog is a material issue that must be decided by the trier of fact.^{FNI} *See* Deposition of Adrienne Henning at 183-184; *see also* Decl. of Darren Mayo in Supp. of Defts' Mot. for Summ. J., ¶¶ 5-6 (probation search of residence directed after son's arrest); Decl. of Michael Haynes in Supp. of Defts' Mot for Summ. J., ¶¶ 4-5 (same; entry into house to effect arrest made through one back window). Defendants have failed to meet their initial burden on the affirmative defense of qualified immunity. Summary judgment as to the individual defendants should therefore be denied.

^{FNI}. For these reasons, defendants' argument that they are entitled to discretionary immunity on plaintiff's state law claims must fail as well.

For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

1. The motion for summary judgment of defendants Sacramento County and Sacramento County Sheriff's Department be granted; and
2. The motion for summary judgment of the individual defendants be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case,

pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.1991).

E.D.Cal., 2006.

Henning v. County of Sacramento

Slip Copy, 2006 WL 3348858 (E.D.Cal.)

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HTurner v. Fallen
N.D.Ill.,1993.

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern
Division.

Jewel TURNER, Plaintiff,

v.

Thomas FALLEN, Star # 13565, H.J. Collins, Star #
14206, Greg Salvi, Star # 8939, and Police Officers
John Doe 1-4, Defendants.

No. 92 C 3222.

Jan. 22, 1993.

MEMORANDUM OPINION

KOCORAS, District Judge:

*1 This matter is before the Court on defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, we deny the motion, in part, and grant it, in part.

BACKGROUND

Plaintiff, Jewel Turner ("Ms. Turner") filed a five-count action against defendants, Thomas C. Fallen, H.J. Collins, Greg Salvi, and Police Officers John Doe 1-4 (collectively, "police officers") pursuant to 42 U.S.C. § 1983 and § 1988 for alleged violations of the Fourth and Fourteenth amendments of the United States Constitution. The complaint alleges that each of the defendants is employed as a police officer by the Chicago Police Department and at all relevant times was acting within this scope of employment.

On November 5, 1992, this Court entered a Memorandum Opinion Order, dismissing all counts of Ms. Turner's complaint. With the Court's permission, Ms. Turner filed a second amended complaint, in which she raises three counts against the police officers.

Count I of Ms. Turner's second amended complaint purports to state a claim for unlawful search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution and the Constitution of Illinois. She alleges in this claim that the police

officers, in their search of her establishment, acted in an unreasonable fashion in violation of her federal and state rights. Count II of the second amended complaint alleges a claim for false arrest on the grounds that the police officers had no probable cause to arrest her in violation of the Fourth and Fourteenth Amendments of the United States Constitution and the Constitution of Illinois. Count III purports to state a claim for malicious prosecution under the Fourth and Fourteenth Amendments of the United States Constitution and the Constitution of Illinois.

The present action arises out of the police officers' execution of a search warrant in Ms. Turner's establishment on May 31, 1990, a consignment clothing store known as Dynasty II located at 5222-24 West North Avenue in Chicago, Illinois. The search warrant, submitted with the police officers' present motion, sets forth only the following articles to be seized: three pairs of silk pants "Index" brand, two silk jackets "Index" brand, two silk shirts "Index" brand, one beige jacket "Index" brand, and one double breasted jacket "Index" brand. The warrant states that the above listed items to be seized constitute evidence of the offense of possession of stolen property and that there is probable cause to believe that these items are located upon the person and premises of Dynasty II.^{FNI}

Ms. Turner alleges that the actions of the police officers, in executing this search warrant of her consignment shop, was unreasonable. She claims that the officers were not searching for drugs, which could be concealed in crevices and small places. Despite this fact, Ms. Turner alleges that the police officers took the following unreasonable actions in executing their search for the clothing items identified in the warrant: broke the front door, broke several ceiling tiles, broke open the cash register without asking for the key despite the key's ready availability, broke open the file cabinet, and smashed the glass display cases.

*2 Ms. Turner further alleges that the police officers confiscated a number of items, totally unrelated to the search warrant, including the following: all licenses from the consignment shop and the hair salon; approximately 300 skirts, blouses, dresses, slacks and other clothing items; all business records and consignment receipts for clothing which were in a six

drawer file cabinet; dress racks; checks payable to Ms. Turner; diamond earrings; several hundred dollars of U.S. Currency; and numerous other clothing items. Allegedly, Ms. Turner's establishments were emptied in truckloads despite the police officers' having no evidence that this merchandise was stolen. Ms. Turner claims that the actions of the police officers put her out of business.

Ms. Turner's also complaint states that she had another establishment, the Dynasty II Hair Salon, located next door to the Dynasty II consignment shop. She alleges that, despite the fact that the hair salon did not sell clothes and, thus, had nothing to do with the search warrant, the police officers searched throughout the hair salon, committing damage, disrupting business, and harassing salon customers.

In addition, Ms. Turner alleges that, without probable cause, the police officers arrested her and kept her in jail for several days. Charges of felony theft were raised against her but were dismissed in her favor. According to Ms. Turner, a week after her release, she was arrested once again without probable cause, and once again the charges were dismissed. Based upon these arrests and charges brought against her, Ms. Turner alleges a claim of false arrest (Count II) and a claim for malicious prosecution (Count III).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the police officers move to dismiss all counts of Ms. Turner's second amended complaint for failure to state a claim upon which relief can be granted. Before addressing the parties' contentions below, the Court will first address the appropriate legal standard by which to judge the present motion.

LEGAL STANDARD

To withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. Conley v. Gibson, 355 U.S. 41 (1957). The defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must construe the complaint's allegations in the light most favorable to the plaintiff

and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 733 (7th Cir.1986), *cert. denied*, 482 U.S. 915 (1987). The allegations of a complaint should be construed liberally and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. at 45-46 (1957). See also Hishon v. King & Spalding, 467 U.S. 69 (1984); Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411 (7th Cir.1986). The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. We address the police officers' motion with these principles in mind.

DISCUSSION

A. Count I

*3 According to the police officers, Ms. Turner has failed to sustain her burden of alleging the elements for an unreasonable search and seizure. In the alternative, the defendants contend that, as police officers, they are entitled to qualified immunity from liability for actions that a reasonable officer could believe to be lawful in light of then clearly established law. However, in view of the second amended complaint's additional damage claims and increased specificity, we reject the police officer's contentions and, therefore, deny their motion to dismiss Ms. Turner's fourth amendment claim for unreasonable search and seizure.

We recognize that Ms. Turner has the burden of pleading the elements for an unreasonable search and seizure. See Currier v. Baldrige, 914 F.2d 993, 996 (7th Cir.1990). Even though the law enforcement officers may have a reasonable and good faith belief in the validity of the search warrant, they may nonetheless incur liability under § 1983 if the warrant is executed in an unreasonable manner. Duncan v. Barnes, 592 F.2d 1336, 1338 (5th Cir.1979)X. While damage to property may be unavoidable in the execution of a search warrant, Dalia v. United States, 441 U.S. 238, 258 (1979), the manner in which a warrant is executed is subject to later judicial review as to its reasonableness. McCrimmon v. Kane County, 606 F.Supp. 216, 221

(N.D.Ill.1985); *See also King v. Avila*, 760 F.Supp. 681, 685 (N.D.Ill.1989) (holding property damage to the place searched is subject to judicial review of reasonableness). In *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C.1982), the court held, "Whether a search is unreasonable 'by virtue of its intolerable intensity and scope,' (citation omitted) must be determined by the particular facts of the case, including the scope of the search authorized by the warrant. It is a longstanding requirement that the officers remain on the premises only so long as is reasonably necessary to conduct the search and that they avoid unnecessary damage to the premises." *See also New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("what is reasonable depends on the context within which a search takes place").

In consideration of the amended complaint, we find that the cases relied upon by the police officers for their present argument, such as *Dalia*, 441 U.S. 238, and *Bates v. Ft. Wayne*, 591 F.Supp. 711 (N.D.Ind.1983), are distinguishable from the present case. In *Bates*, the court found that the defendant officers executed the warrant in a manner which was not unreasonable. The court based their finding on the fact that they found plaintiffs' allegations that the defendants "tore up their residential area and their belongings" and committed other unreasonable actions to be false. *Bates*, 591 F.Supp. at 722. Moreover, the *Bates* case involved a warrant for the search of drugs. The court noted that where "drugs are involved, they can be hidden anywhere, in small places and in small containers," and, therefore, "[t]he officers disturbed only what was necessary in their search for contraband." *Id.*

*4 In the present case, unlike *Bates*, the police officers do not dispute Ms. Turner's allegations concerning the damage caused to her establishment. Moreover, the police officers were searching for items of clothing, which, unlike drugs, could not be hidden in small places and containers. Ms. Turner's second amended complaint addresses this distinction through such allegations as "in that this was a consignment shop, everything was out in the open" and "Defendants were not searching for drugs which would be concealed in crevices and small places."

In *Dalia*, the Supreme Court found that "police officers, when executing a search warrant, must damage

property in order to perform their duty." In support of this statement, the Court cited a number of cases involving defendant-officers breaking down an outer door to enable them to execute the warrant after notice of their authority and purpose. *Dalia*, 441 U.S. at 258 (citing, *United States v. Brown*, 556 F.2d 304, 305 (5th Cir.1977); *United States v. Gervato*, 474 F.2d 40, 41 (3rd Cir.1973), *cert denied*, 414 U.S. 864 (1973).

In the present case, the damage alleged by Ms. Turner surpasses the mere breaking down of her shop's door. Rather, Ms. Turner alleges specific facts to support her claim that the police officers' search was unreasonable. For example, she alleges that the police officers intentionally smashed the glass display cases in her shop in order to confiscate certain items found within the cases. Yet, the officers did not first notify her of their need to enter the cases, nor did they try to find another way into the display cases that could have avoided the unnecessary property damage. Likewise, Ms. Turner alleges that the police officers broke her cash register and file cabinet, when they could have avoided this property damage merely by asking her to unlock these items. As such, Ms. Turner alleges that the police officers destroyed and damaged property not reasonably necessary to effectively execute their search warrant. *See Tarpley*, 684 F.2d at 9 ("destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment"). In light of these allegations, we find that Ms. Turner has sufficiently set forth facts indicating the police officers' unnecessary damage to property.

Moreover, whereas the search warrant only identified a handful of "Index"-brand clothing items to be seized, Ms. Turner alleges that her establishments were emptied in truckloads. As stated above, she claims that the police officers' seized a significant number of items not named on the warrant, including licenses, business records, dress racks, checks payable to plaintiff, several hundreds of dollars in cash, and hundreds of items of clothing. As stated in *McCrimmon*, "[i]f officers armed with a duly issued search warrant could disregard its limitations with impunity in deciding what to seize, the constitutional guaranty (citation omitted) would be impermissibly diluted." 606 F.Supp. at 220. Like the *McCrimmon* case, the police officers in the present case have not attempted to argue that the seizures were

reasonable, but rest their argument solely on the fact that their search warrant was lawfully obtained. Accordingly, this reasonableness inquiry itself poses questions of fact not susceptible of resolution on a Rule 12(b)(6) motion.

*5 In short, in consideration of the liberal pleading standard of *Conley*, this Court determines that it is not clear from Ms. Turner's second amended complaint that she can prove no set of facts indicating unreasonable execution of the search warrant. Accordingly, we deny the police officers' motion as to Count I's due process claims under the Fourth and Fourteenth Amendments of the Constitution.^{FN2}

B. Counts II and III

In Count II of her second amended complaint, Ms. Turner alleges that the police officers arrested her on two occasions without probable cause and that the charges were dismissed in her favor. In Count III, Ms. Turner alleges that the police officers charged her with felony theft without probable cause to believe that she had stolen any of the items. Thus, both her false arrest claim and malicious prosecution claim rest on Ms. Turner's allegation that the police officers' lacked probable cause to arrest and bring charges against her.

For a § 1983 claim for false arrest or malicious prosecution, the test is "not whether the arrest was constitutional or unconstitutional or whether it was made with or without probable cause, but whether the officer believed in good faith that the arrest was made with probable cause and whether that belief was reasonable." *McCrimmon*, 606 F.Supp. at 221 (citing *Lenard v. Argento*, 699 F.2d 874, 884 (7th Cir.1983)). Actual existence of probable cause is an absolute bar to a § 1983 action. *Terket v. Lund*, 623 F.2d 29, 31 (7th Cir.1980). Because we determine that Ms. Turner has failed to meet her burden of pleading the elements of want of probable cause for her arrest and subsequent charge of felony theft, this Court finds that she fails to state a claim under both Count II and Count III of her second amended complaint.

In addressing the concept of "probable cause," we recognize that this concept is not susceptible to a precise definition. *Bates*, 591 F.Supp. at 724. Probable

cause exists where the "facts and circumstances [are] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Id.* (citing *Gerstein v. Pugh*, 420 U.S. 103, 111-112 (1975)). The proof for probable cause does not approach the level of proof needed for guilt beyond a reasonable doubt or even by a preponderance of the evidence. *Id.*; see also *McKinney v. George*, 556 F.Supp. 645 (N.D.Ill.1983), *aff'd*, 726 F.2d 1183 (7th Cir.1984). A reasonable suspicion of guilt is sufficient to support a good faith belief in the existence of probable cause. *Bates*, 591 F.Supp. at 725. We further recognize that "[t]he validity of the arrest does not depend on whether the suspect actually committed a crime;" rather, the arresting officer need only have probable cause to believe the suspects conduct violated the law. *McCrimmon*, 606 F.Supp. at 221 (quoting *Michigan v. DeFillippos*, 443 U.S. 31, 36 (1979)).

With this case law in mind, we find that Count II of Ms. Turner's second amended complaint fails to allege facts indicating a lack of probable cause for her arrest, and, therefore, fails to state a claim for false arrest. Ms. Turner alleges in this count that she was subject to false arrest due to the police officer's arrest of her without probable cause. Ms. Turner has the burden of pleading and proving the elements of want of probable cause for her arrest, see *Currier*, 914 F.2d at 996, and mere conclusory statements or boilerplate language is not sufficient to state a claim for false arrest pursuant to § 1983. See also *Sivard v. Pulaski County*, 959 F.2d 662, 667 (7th Cir.1992); *Streetman v. Jordan*, 918 F.2d 555, 556-57 (5th Cir.1990).

*6 The Court finds that Count II of Ms. Turner's complaint is deficient in a number of ways. For one, the circumstances surrounding Ms. Turner's two arrests remain unclear from the face of the complaint. Also unclear is whether the police officers made the second arrest pursuant to an arrest warrant, a circumstance which would serve to refute Ms. Turner's allegations of lack of probable cause. Moreover, we find that the complaint is silent with regard to the grand jury indictment against her on July 17, 1990. The police officers submitted to the Court a copy of this indictment, in which the grand jury found that Ms. Turner had committed the offense of theft. Because return of a grand jury indictment indicates the existence

of probable cause, the indictment against Ms. Turner on July 17, 1990 provides a further reason to conclude that she was not arrested without probable cause. Thus, Count II rests solely on Ms. Turner's conclusory allegation that the police officers had no probable cause to arrest her and her allegation that the charges were later dropped against her. Yet, As stated above, the mere fact that the charges against her were later dropped is irrelevant to a claim of false arrest. McCrimmon, 606 F.Supp. at 216. On the basis of the complaint's deficiency, we hold that Count II fails to allege the requisite elements for want of probable cause for arrest. Accordingly, we determine that Ms. Turner has failed to come forward with allegations that could support a jury verdict in her favor on the elements of her federal claim for false arrest and we dismiss Count II accordingly.

We dismiss Count III of Ms. Turner's second amended complaint for like reasons. Count III purports to state a claim under section 1983 and Illinois law against the police officers based on her arrest and indictment by a grand jury. With respect to Count III's federal claim for malicious prosecution, Ms. Turner has the burden of alleging a deprivation of constitutional proportions in connection with the allegedly malicious prosecution of charges against her. McCrimmon, 606 F.Supp. at 222. As stated by the Seventh Circuit in Easter House v. Felder, 879 F.2d 1458, 1477 (7th Cir.1989):
Ordinarily, a claim of malicious prosecution does not state a basis for relief under section 1983. (citations omitted). Only if a plaintiff, in addition to being the target of a properly motivated investigation, can demonstrate that he has been "subjected ... to a deprivation of constitutional magnitude" may we find that he may maintain a section 1983 action.

(citing Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir.1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980)). The Felder court further stated, "Clearly, unwarranted investigation by licensing officials, conducted in a manner calculated to discourage customers or interfere with a licensee's business, may violate a property right." *Id.* See also Reed v. Shorewood, 704 F.2d 943, 949 (7th Cir.1983) (holding that "harassment of customers, employees and relentless, baseless prosecutions" may constitute deprivation of property).

*7 Ms. Turner bases her federal claim for malicious prosecution on her conclusory allegations that the police officers charged her with felony theft without probable cause to believe that she had stolen any of the items and proceeded with the prosecution of these charges, despite the officers' knowledge that these charges were false. Yet, as held above, we find that Ms. Turner fails to allege a lack probable cause for her arrest and charges. Therefore, she cannot claim that the police officers' charges against her constituted "baseless prosecution." Moreover, while Count III alleges that Ms. Turner had to seek an attorney to defend her in these charges raised against her, we determine that Ms. Turner's allegations do not rise to the level of a property deprivation of constitutional magnitude. Felder, 879 F.2d at 1477; Reichenberger v. Pritchard, 660 F.2d 280, 285 (7th Cir.1981) ("legal fees expended by the plaintiffs in the administrative proceedings cannot qualify as a constitutional injury absent a showing of deprivation of constitutional magnitude"). On this basis, we find that Ms. Turner fails to state a § 1983 claim for malicious prosecution.

We also determine that Ms. Turner fails to allege facts to support a claim for malicious prosecution under Illinois law. As set forth in Avila, 760 F.Supp. at 683: In Illinois, in order to state a claim for malicious prosecution, the plaintiff must show 1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; 2) the termination of the proceeding in favor of the plaintiff; 3) the absence of probable cause for such proceeding; 4) the presence of malice; 5) damages resulting to plaintiff.

See Hajawii v. Venture Stores, Inc., 465 N.E.2d 573 (1st Dist.1984); Joiner v. Benton Community Bank, 411 N.E.2d 229 (1980). However, as already determined, Ms. Turner has failed to allege the absence of probable cause for the charges raised against her. Because the absence of probable cause is a requisite element to a cause of action for malicious prosecution, the Court finds that Count III fails to state a claim for malicious prosecution under either § 1983 or Illinois law.

CONCLUSION

For the foregoing reasons, the Court denies the police officers' motion to dismiss Count I of the second amended complaint but grants the motion to dismiss Counts II and III.

FN1. The complaint for the search warrant states that the complainant has probable cause to believe that the above listed things to be seized are located upon the premises of Dynasty II, based upon facts disclosed by the informant, "Jane Doe." For example, the complaint indicates that Jane Doe informed the police that, while at the Dynasty II, she observed exclusive brand-name clothing belonging to Oaktree, Inc., the only authorized merchant to market these brands.

FN2. In light of our present determination that Ms. Turner has sufficiently stated a federal due process claim arising from the police officers' alleged unreasonable execution of the search warrant, we reject the officers' alternative argument that they are qualifiedly immune from civil liability under Count I's federal claim. See Polenz v. Parrott, 883 F.2d 551, 553-54 (7th Cir.1989) (Government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does *not* violate clearly established statutory or constitutional rights of which a reasonable person would have known).

N.D.Ill.,1993.

Turner v. Fallen

Not Reported in F.Supp., 1993 WL 15647 (N.D.Ill.)

END OF DOCUMENT

HLogan v. Weatherly

E.D.Wash.,2006.

Only the Westlaw citation is currently available.

United States District Court,E.D. Washington.

Nicole LOGAN, et al., Plaintiffs,

v.

William WEATHERLY, Dan Hargraves; Ruben Harris;

Don Herrof; and Andrew Wilson, et al., Defendants.

No. CV-04-214-FVS.

June 6, 2006.

James W. Beck, Thaddeus P. Martin, Darrell Lee Cochran, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, Tacoma, WA, for Plaintiffs. Andrew George Cooley, Kimberly J. Waldbaum, Richard B. Jolley, Stewart Andrew Estes, Keating, Bucklin & McCormack Inc. PS, Seattle, WA, for Defendants.

ORDER RE: DEFENDANTS' MOTION FOR
RECONSIDERATION RE: COURT'S ORDER
DENYING IN PART AND GRANTING IN PART
DEFENDANTS' MOTION FOR SUMMARY
JUDGEMENT RE: PLAINTIFFS' STATE LAW
CLAIMS

FRED VAN SICKLE, District Judge.

***IBEFORRE THE COURT** is Defendants' Motion for Reconsideration Re: Court's Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment Re: Plaintiffs' State Law Claims. (Ct.Rec.395). Plaintiffs are represented by Darrell Cochran and Thaddeus Martin. Defendants are represented by Andrew Cooley, Stewart Estes, Kim Waldbaum and Richard Jolley.

I. BACKGROUND

This is a class action arising from the response of the City of Pullman Police Department to an altercation at the Top of China Restaurant and Attic Nightclub on September 8, 2002. The alleged facts are set forth in detail in the Court's Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment Re: Qualified Immunity. (Ct.Rec.240). Plaintiffs' Amended Complaint asserts claims against the individual Defendant Officers under Washington state law for assault (Complaint, ¶ 6.2), intentional

infliction of emotional distress or the tort of outrage (Complaint, ¶ 6.3), and negligence (Complaint, ¶ 6.4), as well as claims against the City of Pullman Police Department for negligence under a theory of respondeat superior (Complaint, ¶ 6.4) and negligent training, hiring, and supervision (Complaint, ¶ 6.5). See Ct. Rec. 137. Defendants moved for summary judgment dismissal of these claims under Washington state law. The Court entered an Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment ("Order"). (Ct.Rec.391). Specifically, the Court granted Defendants' motion for summary judgment dismissal of Plaintiffs' claims for negligent supervision, training and hiring. With respect to Plaintiffs' assault claims that were not barred by the applicable statute of limitations, the Court denied Defendants' motion for summary judgment. Further, the Court denied Defendants' motion for summary judgment to the extent it sought dismissal of Plaintiffs' claims for outrage and negligence. Defendants now move for reconsideration of the Court's Order as it pertains to Plaintiffs' assault claims and negligence claims.

II. DISCUSSION

Defendants seek reconsideration of the Court's Order on two specific grounds: (1) whether Plaintiffs' negligence claims are barred by the public duty doctrine; and (2) whether the doctrine of transferred intent is applicable to Plaintiffs' assault claims.

A. Standard of Review

The Federal Rules of Civil Procedure do not mention a "motion for reconsideration." Even so, a motion for reconsideration is treated as a motion to alter or amend judgment under Rule 59(e) if it is filed within ten days of entry of judgment. United States v. Nutri-Cology, Inc., 982 F.2d 394, 397 (9th Cir.1992). Here, Defendants timely filed their motion for reconsideration. Thus, it is within the Court's discretion to reconsider its Order. See School Dist. No. 1J, Multnomah County, OR v. AcandS, Inc., 5 F.3d 1255, 1262 (9th Cir.1993). Accordingly, the Court exercises its discretion and will reconsider its Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment Re: Plaintiffs' State Law Claims

("Order").

B. Negligence

*2 Plaintiffs' Amended Complaint alleges the individual Defendant Officers were negligent because they: "(1) failed to communicate knowledge of the social function at the Top of China between changing shifts and plan for a controlled response to situations at the function; (2) failed to plan and assess their response to the call for assistance; (3) failed to establish physical presence at the scene, verbalize a cease and desist order, and control the isolated disturbance with as little force as possible; (4) failed to assess the environmental conditions of the confined building before discharging oleoresin capsicum; (5) discharged O.C. into a confined building occupied by several hundred innocent persons; (6) failed to provide for safe crowd control following intentional use of gas in the building; and (7) failed to administer medical attention to or call for a medical response on behalf of the victims."Court's Order, at 16 (internal quotations omitted) (citing Plaintiffs' Amended Complaint, ¶¶ 6.4.1-6.4.7.). The Court concluded that whether "the Officers exercised the ordinary care or such care as a reasonable person would have exercised under the same or similar circumstances ... raised issues of material fact with respect to whether the Officers were negligent."Court's Order, at 16. On that basis, the Court denied Defendants' motion for summary judgment on Plaintiffs' negligence claims.

Defendants move for reconsideration, arguing Plaintiffs' negligence claims against the individual Officers are barred by the public duty doctrine. Additionally, now that the City of Pullman Police Department has been dismissed from this action, Defendants request the Court dismiss the negligence claims against the Pullman Police Department, which are based on the doctrine of respondeat superior. *See* Amended Complaint, ¶ 6.4.

1. City of Pullman Police Department

Plaintiffs argue the City of Pullman is still a proper defendant for Plaintiffs' state law causes of action because the Court's Order Granting Defendants' Motion for Judgment on the Pleadings (Ct.Rec.426) only dismissed the City of Pullman Police Department, not

the City of Pullman. However, the City of Pullman is not a named party in this action. Plaintiffs correctly note that when the *Logan* and *Arnold* cases were consolidated, the Court's Order indicated that the City of Pullman was a proper remaining defendant. At that time, the Court's statement was true because although the *Arnold* complaint did not name the City of Pullman as a defendant, the *Logan* complaint did name both the City of Pullman and the City of Pullman Police Department as defendants. However, Plaintiffs later sought and obtained permission to file an Amended Complaint in this consolidated action. Plaintiffs' Amended Complaint (Ct.Rec.137) does not name the City of Pullman. Rather, the Amended Complaint only names the "City of Pullman Police Department; William T. Weatherly; Dan Hargraves; Ruben Harris; Don Heroff; and Andrew Wilson."Consequently, the City of Pullman was terminated as a party defendant in this case.

*3 An "amended complaint supersedes the original, the latter being treated thereafter as being non-existent."*Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir.1997). Because the City of Pullman was not named in Plaintiffs' Amended Complaint, the City of Pullman is not a party in this action. Accordingly, since the Pullman Police Department has been dismissed from this action, the only remaining negligence claims include Plaintiffs' claims against the individual Defendant Officers.

2. Public Duty Doctrine

"Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)."*Taylor v. Stevens County*, 111 Wash.2d 159, 163, 759 P.2d 447 (1988). Defendants argue summary judgment should be granted on Plaintiffs' negligence claims because Plaintiffs failed to establish whether the Officers owed any duty of care to each of the individual Plaintiffs under their multiple negligence theories. In response, Plaintiffs argue Defendants should be prohibited from seeking summary judgment under the public duty doctrine because Defendants never specifically raised this issue in their

original motion for summary judgment. Alternatively, Plaintiffs argue the public duty doctrine is not applicable to the facts of this case.

Although Defendants did not specifically address the issue of the public duty doctrine in their original motion for summary judgment, they did argue Plaintiffs had failed to establish that the Defendant Officers owed any specific duty to Plaintiffs. In its Order, the Court concluded the Defendants had withdrawn their motion for summary judgment with respect to Plaintiffs' negligence claims because Defendants did not mention it in their reply brief. However, Defendants contend they didn't address the issue in their reply brief because Plaintiffs failed to meet their burden of proving the existence of a duty. Defendants now state they "regret not better explaining this position" but urge the Court to consider the issue now on Defendants' motion for reconsideration.

The Court recognizes that its Order never specifically addressed what "duty" the Officers owed the Plaintiffs. Since the first hurdle in any negligence action is establishing a duty[.], Bratton v. Welp, 145 Wash.2d 572, 576, 39 P.2d 959 (2002), prior to trial the Court will necessarily have to make a determination as to the applicability of the public duty doctrine. Therefore, the Court concludes it is appropriate and necessary to reconsider its Order and determine to what extent Plaintiffs' negligence claims are affected by the public duty doctrine.

"The existence of a duty is a question of law, not fact. Minahan v. W. Wash. Fair. Ass'n, 117 Wash.App. 881, 890, 73 P.3d 1019, 1024 (Div.2, 2003); Pedroza v. Bryant, 101 Wash.2d 226, 228, 677 P.2d 166 (1984). A duty can arise either from common law principles or from a statute or regulation. Doss v. ITT Rayonier, Inc., 60 Wash.App. 125, 129, 803 P.2d 4, rev. denied, 116 Wash.2d 1034, 813 P.2d 583 (1991). The public duty doctrine serves as a "framework" for courts to use when determining when a public official owes a specific statutory or common law duty to a plaintiff suing in negligence. Cummins v. Lewis County, 133 P.3d 458, 462 (2006). "Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not

merely the breach of an obligation owed to the public in general (i.e, a duty to all is a duty to no one)." Taylor v. Stevens County, 111 Wash.2d 159, 163, 759 P.2d 447, 449-450 (1988) (citation and internal quotations omitted). "There are four common law exceptions to the public duty doctrine. If one of these exceptions applies, the [public official] will be held as a matter of law to owe a duty to the individual plaintiff or to a limited class of plaintiffs." Cummins, 133 P.3d at 462 (internal quotations and citations omitted). "The exceptions are (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship." *Id.* at n. 7.

*4 Here, Plaintiffs do not argue that an exception to the public duty doctrine applies. Rather, Plaintiffs argue the public duty doctrine is inapplicable to cases, such as this, where the negligence flows from "actions as opposed to inactions." See Coffel v. Clallam, 47 Wash.App. 397, 403, 735 P.2d 686, 690 (Div.2, 1987). ("The [public duty] doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care."). Thus, Plaintiffs argue that once the Officers decided to break up the altercation at the Top of China Restaurant and The Attic nightclub by taking affirmative action and discharging O.C. spray, the Defendant Officers had a duty to act with reasonable care.

In Coffel, the owner (Mr. Coffel) and the tenant (Mr. Knodel) of a commercial building brought suit against various county police officers for failure of law enforcement to take action to prevent the destruction of the building by Clinton Caldwell, a former owner of a one-half interest in the building. Coffel, 47 Wash.App. at 398, 735 P.2d 686. The gist of the plaintiffs' claims was that the defendant officers stood by while the plaintiffs' building and contents were being destroyed by Mr. Caldwell and prevented plaintiffs from doing anything about the destruction even though the officers knew of plaintiff Coffel's claim of ownership and plaintiff Knodel's claim of possession. Coffel v. Clallam County, 58 Wash. App. 517, 519, 794 P.2d 513 (Div.2, 1990). The gist of the defense was that since there was a civil dispute over ownership of the building, the officers were under no duty to intervene and that, in any

event, the public duty doctrine shielded them from liability for their actions or failure to act. *Id.* The court of appeals held that plaintiffs had stated a cause of action for negligence by alleging the officers at the scene acted affirmatively in preventing plaintiffs from protecting their property against destruction. Coffel, 47 Wash.App. at 403-04, 735 P.2d 686. However, the court of appeals dismissed the negligence claims against the officers who were present at the scene insofar as they were based on “inaction” of the officers. *Id.* The court remanded to the trial court for a determination of “whether affirmative action was taken by [the] officers, and whether any action taken was below the standard of reasonable care and whether such action proximately resulted in damage to plaintiffs for which defendants are liable.” *Id.* at 405, 735 P.2d 686.

Under *Coffel*, Plaintiffs’ claim that the Individual Defendant Officers were negligent in dispersing O.C. spray inside the building is not precluded by the public duty doctrine. However, the public duty doctrine is still applicable to the remainder of Plaintiffs’ negligence theories which are based on allegations that the Officers “failed” to act in some way. See Plaintiffs’ Amended Complaint, at ¶¶ 6.4.1-4 (Plaintiffs “failed to communicate knowledge of the social function”, “failed to plan and assess their response”, “failed to establish physical presence at the scene”, “failed to assess the environmental conditions of the confined building before discharging” O.C. spray) and ¶¶ 6.4.6 and 6.4.7. (“failed to provide for safe crowd control following use of” O.C. and “failed to administer medical attention to or call for medical response” for Plaintiffs). Thus, these theories of negligence are not actionable because Plaintiffs have failed to show any exception to the public duty applies.

B. Doctrine of Transferred Intent

*5 Defendants also move for reconsideration of the Court’s Order, to the extent it holds that the doctrine of transferred intent is applicable to Plaintiffs’ assault claims. In its Order, the Court held that under the doctrine of transferred intent, “the officers’ intent with respect to those individuals who were directly sprayed by O.C. transfers to all of the plaintiffs who were inside the building when O.C. was sprayed.” Order, at 8. Defendants argue the doctrine of transferred intent has

not been specifically adopted in civil cases in Washington. In the alternative, Defendants argue that even if the Court concludes the doctrine has been adopted in civil cases in Washington, the doctrine is not applicable the facts in this case.

In holding that the doctrine was applicable to this civil case, the Court’s Order cited to State v. Clinton, 25 Wash.App. 400, 606 P.2d 1250 (1980), a criminal case wherein the defendant was convicted of second-degree assault. The defendant taunted a husband to fight with him and began swinging a piece of pipe so violently that the pipe left his hand, sailed past the husband and struck the wife. The court held that an instruction on the doctrine of transferred intent was appropriate and affirmed the defendant’s conviction for second-degree assault against the wife.

In contrast to the facts in *Clinton*, Defendants argue the doctrine of transferred intent is not applicable to this case because it is not a “shoot and miss” case. Instead, this is a case where the Officers’ alleged intended victims of the O.C. were actually sprayed with O.C. In support of their argument, Defendants cite several cases from other jurisdictions wherein courts that have adopted the doctrine of transferred intent have specifically held that it does not apply to the “shoot and hit” scenario. See e.g., State v. Ford, 625 A.2d 984, 997-998 (Md.1993) (holding that where the crime intended has actually been committed against the intended victim, transferred intent is unnecessary and should not be applied to acts against unintended victims). In response, Plaintiffs point to decisions from other jurisdictions wherein courts have held that the doctrine of transferred intent is applicable when a defendant kills an intended victim as well as an unintended victim. See e.g., Harvey v. State, 111 Md.App. 401, 681 A.2d 628 (1996) (the doctrine of transferred intent operates with full force whenever the unintended victim is hit and killed; it makes no difference whether the intended victim is missed; hit and killed; or hit and only wounded); State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000); Ochoa v. State, 115 Nev. 194, 981 P.2d 1201, 1205 (1999); Mordica v. State, 618 So.2d 301, 303 (Fla.Dist.Ct.App.1993); and State v. Worlock, 117 N.J. 596, 569 A.2d 1314, 1325 (1990).

The Court determines the doctrine of transferred intent is unnecessary to find the Officers assaulted those Plaintiffs who were directly sprayed with O.C. and those Plaintiffs who suffered only secondary effects. The Washington legislature has not defined "assault" and thus Washington courts have turned to the common law for its definition. State v. Wilson, 125 Wash.2d 212, 217, 883 P.2d 320, 323 (1994). "Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting the harm [common law assault]. *Id.* (citing State v. Bland, 71 Wash.App. 345, 353, 860 P.2d 1046 (1993)). "Assault by battery does not require specific intent to inflict harm or cause apprehension; rather battery requires intent to do the physical act constituting assault. The other two forms of assault, however, require specific intent that the defendant intended to inflict harm or cause reasonable apprehension of bodily harm." State v. Hall, 104 Wash.App. 56, 62, 14 P.3d 884, 887 (Div.3, 2000) (internal citation omitted). Here, Plaintiffs don't rely on the assault by battery definitions. Rather, Plaintiffs appear to rely on the third common law definition of assault: assault by attempt to cause fear and apprehension of injury. "Assault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury." State v. Eastmond, 129 Wash.2d 497, 500, 919 P.2d 577, 578 (1996).

*6 "Transferred intent is only required when a criminal statute matches specific intent with a specific victim." Wilson, 125 Wash.2d at 219, 883 P.2d at 324. For example, the doctrine of transferred intent is unnecessary to convict a defendant of assaulting both his intended victim and his unintended victim in the first degree because once intent to inflict great bodily harm is established, the mens rea is transferred to any unintended victim. See RCW 9A.36.011; see e.g., Wilson, 125 Wash.2d at 218, 883 P.2d at 323 ("Assault in the first degree [which involves assault by battery] requires a specific intent [to inflict great bodily harm]; but it does not, under all circumstances, require that the specific intent match a specific victim."). Similarly, the doctrine of transferred intent is unnecessary to convict a

perpetrator of assaulting an unintended victim in the second-degree because that statute, RCW 9A.36.021(1), does not match specific intent with a specific victim. See RCW 9A.36.021; see e.g., State v. Allen, 105 Wash.App. 1040, 2001 WL 316177 (Div.1). The second degree assault statute, which includes the common law definition of assault, requires that the perpetrator have the intent to create "in another" "apprehension and fear of bodily injury." RCW 9A.36.021(1). It also requires that the perpetrator create "in another" a "reasonable apprehension and imminent fear of bodily injury." *Id.* However, this offense does not require that the intended person and the person who suffered the assault be the same person. *Id.*

The statutory definitions for criminal assault, which rely on the common law definitions of assault, do not require proof of a specific intent to assault the named victim. See Wilson, 125 Wash.2d 212, 883 P.2d 320. In other words, once intent to assault another is established, the mens rea is transferred to any unintended victim. See *supra*. Thus, if Plaintiffs prove the Officers intended to assault (i.e., intended to create apprehension and fear of bodily injury) those Plaintiffs who were directly sprayed with O.C., the intent transfers to all Plaintiffs who were assaulted (i.e., intended and unintended victims), even though the Officers may not have intended to assault those Plaintiffs who were not directly sprayed with O.C.

CONCLUSION

Upon reconsideration of its Order, the Court determines that the only remaining negligence claims at this stage of the proceedings include Plaintiffs' claims against the individual Defendant Officers. Further, the Court concludes that Plaintiffs' claim that the Officers were negligent in dispersing O.C. spray inside the building is not precluded by the public duty doctrine. Whether the Officers' use of O.C. spray was below the standard of reasonable care and whether such action proximately resulted in damage to Plaintiffs is a question for the jury. However, Plaintiffs' remaining negligence theories are precluded by the public duty doctrine. With respect to Plaintiffs' assault claims that are not barred by the statute of limitations, the Court concludes the doctrine of transferred intent is unnecessary to find the Officers intended to assault those Plaintiffs who were directly

sprayed with O.C., as well as those Plaintiffs who were not directly sprayed but suffered secondary effects.

*7 IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration Re: Court's Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment Re: Plaintiffs' State Law Claims (Ct.Rec .395) is DENIED IN PART AND GRANTED IN PART.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

E.D.Wash.,2006.

Logan v. Weatherly

Not Reported in F.Supp.2d, 2006 WL 1582379
(E.D.Wash.)

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